

# **EMPLOYMENT RELATIONS TRIBUNAL**

## **AWARD**

**ERT/RN 77/18**

**Before**

<b>Rashid Hossen</b>	<b>-</b>	<b>President</b>
<b>Vijay Kumar Mohit</b>	<b>-</b>	<b>Member</b>
<b>Rabin Gungoo</b>	<b>-</b>	<b>Member</b>
<b>Teenah Jutton (Ms)</b>	<b>-</b>	<b>Member</b>

**In the matter of:-**

**Mrs Sooleka Dalwhoor**

**And**

**Belle Mare Beach Development Co. Ltd**

**(The Residence Mauritius)**

Mrs Sooleka Dalwhoor, an employee of the Residence Mauritius Hotel, Belle Mare was sanctioned for wearing a 'tikka' at her place of work.

A 'tikka', as indisputably described by the Disputant, is a red paper sticker applied on the middle of a lady's forehead symbolising sacred marital status.

Belle Mare Beach Development Co. Ltd has been trading under the name ‘The Residence Mauritius’.

We will henceforth refer to the parties, namely Mrs Soolekha Dalwhoor as the Disputant and Belle Mare Beach Development Co. Ltd (The Residence Mauritius) as the Respondent, respectively.

Mr B. Ramdenee, Counsel appeared for the Disputant.

Mr S. Colunday, Counsel appeared for the Respondent.

On 17 April 2018, Disputant reported to the President of the Commission for Conciliation and Mediation the existence of a labour dispute between herself and the Respondent as per Section 64(1) of the Employment Relations Act 2008 (Act No.32 of 2008) as amended.

The conciliatory meetings at the Commission led to no possible settlement.

Consequently, the Commission referred the labour dispute with the consent of the worker to the Tribunal for Arbitration, in terms of Section 69(7) of the Employment Relations Act 2008, as amended.

The two-legged Terms of Reference read as follows:-

- 1. “Whether Belle Mare Beach Development Company Ltd should allow me to wear the “tikka” on my forefront during working hours.”**

**2. “Whether Belle Mare Beach Development Company Ltd should remove the warnings issued to me on 24 March 2018, 29 March 2018 and 10 April 2018.”**

We are for ease of reference reproducing the Statement of Case of the parties.

**STATEMENT OF CASE OF THE DISPUTANT**

**Background facts**

1. On 12<sup>th</sup> June 2018, the Commission for Conciliation and Mediation (the ‘CCM’) referred the labour dispute between the Disputant and the Respondent to the Employment Relations Tribunal (the ‘ERT’) on the following terms:

*“Whether Belle Mare Beach Development Company Ltd should allow me to wear the ‘tikka’ on my forefront during working hours;*

*Whether Belle Mare Beach Development Company Ltd should remove the warnings issued to me on 24 March 2018, 29 March 2018 and 10 April 2018.”*

2. By virtue of a written contract dated 1<sup>st</sup> May 2004, the Respondent employed the Disputant who has been in continuous employment since then, as Sales Assistant.
3. In the year 2012, the Disputant was made to sign another employment agreement by the Respondent following an adjustment in the amount of commission payable.

**Disputant's case**

4. Since her date of entry in 2004 at the Respondent, the Disputant has worn the ‘tikka’ during working hours. The Disputant's terms and conditions of employment as sales assistant do not stipulate that ‘tikkas’ are forbidden on the premises of the Respondent. As such, the Disputant has worn the ‘tikka’ without any interference from Management which has allowed her to wear it. No warning or disciplinary action had been taken against the Disputant for the wearing of the ‘tikka’ or any other reason. On the contrary, the

Respondent has acknowledged and rewarded the Disputant's good performance at work by handing her the 2012 "Star of the Year" award and the "Employee of the Month" award in September 2016.

5. On 28<sup>th</sup> February 2018, after fourteen years of wearing the 'tikka', the Respondent's Corporate Human Resources Manager, Mrs Wazeerah Badurally, abruptly and without any justification, informed the Disputant that 'tikkas' were not allowed during working hours and that she could receive a warning for wearing one. The Disputant had no alternative than to contact the Ministry of Labour as she could not understand the Respondent's new position and she feared for her job.
6. On 24<sup>th</sup> March 2018, the Disputant was locked in an office by two of the Respondent's staff and forced to sign a warning letter. She refused to sign the letter, especially in those conditions, and she was sent a written warning by post for having failed *"to remove the "tika" on her forefront"*. She was further warned that *"should there be recurrence of such unacceptable behaviour on her part, Management shall have no alternative than to take further disciplinary actions as may be appropriate"*.
7. On or about 25<sup>th</sup> March 2018, the Disputant reported a case of 'sequestration' at Belle Mare Police Station following the events of 24<sup>th</sup> March 2018.
8. On 29<sup>th</sup> March 2018, the Disputant was issued a second written warning for again having failed to *"to remove the "tika" on her forefront"* and also for having *"persistently failed to remove the dye/colouring in her hair and to restore same to its natural colour"*. She was once more warned that *"should there be recurrence of such unacceptable conducts on her part, Management shall have no alternative than to take further disciplinary actions as may be appropriate"*. The Disputant refused to sign the letter as she disagreed with the warning which was unjustified.
9. On 10<sup>th</sup> April 2018, the Disputant was issued a "last and final" warning for the same two reasons as in the second letter of warning. She refused to sign because she did not agree that she had failed to comply with the Grooming Standards or Standards of Conduct as alleged by the Respondent.
10. On 13<sup>th</sup> April 2018, the Respondent in bad faith sent a letter accusing the Disputant of leaking confidential information. The Disputant vehemently denies such baseless accusations.
11. On 12<sup>th</sup> June 2018, after representations by officers of the Ministry of Labour, the Respondent undertook to put on hold any further disciplinary action against the Disputant pending the determination of the labour dispute.

12. The Disputant rejects the Respondent's claim that she has breached any of her obligations by wearing a *tikka'* on her forehead. It is not and has never been a condition of her employment with the Respondent that she could not wear a *'tikka'*. The Disputant reiterates that she has been wearing one since 2004 with the consent and encouragement of the Respondent. As stated above, the Respondent has acclaimed the Disputant's work and she has not been the subject of any complaint from the Respondent's guests.
13. Moreover, the Disputant is of the view that wearing a *'tikka'*, which in her case is around one millimetre in diameter, does not constitute a failure to comply with grooming standards. Whereas other grooming conditions have been clearly established by the Respondent and, where applicable, respected by the Disputant, the ban on *tikkas'* has not been part of the grooming requirements for the Disputant. There is accordingly no legal basis for the Respondent's three written warnings which are unfair, unreasonable and unjustified.

#### **STATEMENT OF CASE OF THE RESPONDENT**

A. The terms of reference of this matter are as follows:

- a. "Whether Belle Mare Beach Development Company Ltd should allow me to wear the tika' on my forefront during working hours.**
- b. Whether Belle Mare Beach Development Company Ltd should remove the warnings issued to me on the 24 March 2018, 29 March 2018 and 10 April 2018"**

B. The Management of Belle Mare Beach Development Co Ltd trading under the name of The Residence Mauritius (hereinafter referred to as the Respondent) strenuously denies the allegations levelled by Mrs. Sooleka Dalwhoor (The Disputant) in their forms and tenor.

C. The Employer utterly denies having acted in breach of any of Disputant's terms and conditions of her Contract of Employment nor have acted in any discriminatory and/or illegal manner towards any of its employees including the Disputant. The Respondent which has been in operation since 17 September 1998 and presently employs 400 persons, has always treated all its employees in a fair and equitable manner in compliance with all applicable legislations in force in the Republic of Mauritius.

- D. The Respondent's reply to the Disputant's unfounded allegations are as follows:
- 1) The Disputant has been in employment since 1<sup>st</sup> May 2004.
  - 2) As per paragraph 9(b) of her contract of employment, the Disputant is required to 'strictly observe and abide by all internal rules of the Company which are presently in force and which may be altered from time to time.' It is further provided that 'Any violation of these rules by the Employee will be met by disciplinary action'.
  - 3) Paragraph 9(c) expressly provides that "the other conditions of employment together with the Rules & Regulations of the Company are described in the Employee Handbook to which the Employee should be fully conversant".
  - 4) A copy of the Employee Handbook entitled 'Itinerary to Success' was handed over to the Employee on 22 April 2004 is herewith attached.
  - 5) Originally, in conformity with health and safety regulations applicable for kitchen staff, the HACCP (Hazard Analysis and Critical Control Points) female employees in the kitchen were prohibited from wearing the 'tika' whilst on duty.
  - 6) This restriction was subsequently extended to all female staff of the Food & Beverages Department for obvious hygienic and health & Safety reasons despite the fact that the aforesaid regulations does not apply per se to 'non-kitchen' workers.
  - 7) All staff including the Disputant are regularly given extensive training where they are explained in great details as to how they should inter alia be dressed, wore make up, combed their hair and other matters like personal hygiene.
  - 8) It is apposite to mention that the Disputant has always been allowed to wear the 'sindoor', 'tali' and 'mangalsute' albeit in a very discrete manner.
  - 9) In September 2013 following protest from 'non-kitchen' female workers of the Food & Beverages Department who were prohibited from wearing the 'tika', Management took the decision to apply the restriction on the wearing of the 'tika' to all female employees of the Hotel irrespective of their postings and position.

- 10) The aforesaid extension of the restriction was in line with the 5 (five) star plus hotel professional and neutral Grooming policy and Dress Code of the Respondent which prohibits all visible/external accessories. The restriction on external/visible accessories applies similarly to dreadlocks, beards, long hair, pony tail, burka, mehendi and others.
- 11) The above-mentioned decision to extend the restriction on the wearing of the 'tika' was taken by Management in order to make the Grooming Policy of the Employer compliant with section 4 and in particular sub section (5) of the Employment Rights Act 2008 whereby all employees irrespective of who they are, where they are posted and which position they hold, are treated equally and on the same footing.
- 12) The Disputant has always been complying with the above-mentioned (five) 5 star plus hotel professional and neutral Grooming policy and Dress Code of the Employer. It may have happened in the past that on a couple of occasions she was found to wear the 'tika' whilst being on the Hotel's premises. However, she was immediately requested to comply with the Grooming Policy and she has always complied with the aforesaid policy until February 2018.
- 13) In the month of February 2018, the Disputant was found to be wearing a 'tika' whilst on duty. The Disputant was verbally requested to comply with the Grooming Policy of the Employer.
- 14) However, she refused to do so despite two verbal requests. Consequently, Management had no alternative than to issue her with a Warning on the 24th March 2018. Her persistent refusal to comply with clear instructions given to her in line with the Grooming Policy of the Employer left the latter with no alternative than to issue the Disputant with a Second Warning on the 29th March 2018 and a Last and Final Warning on the 10th April 2018
- 15) On the 13th April 2018, a Communiqué was issued by the Ministry of Labour, Industrial Relations, Employment and Training to the effect that the said Ministry will be prosecuting the Respondent following a complaint lodged by the Disputant.

16) The Respondent who strenuously denies having acted in any discriminatory manner and/or contravened any law of the Republic of Mauritius intends to vehemently defend any action that may be brought against them before any competent jurisdiction.

17) However, without in any way making any admission and while reserving its rights to take all appropriate actions in due time, the Respondent had on the 18th April 2018 at the Conciliation and Mediation Division of the Ministry of Labour, Industrial Relations, Employment and Training acceded to the request of the officers of the aforesaid Ministry to put on hold any further disciplinary action against the Employee pending the determination by the competent court of the eventual action/prosecution to be brought by the Ministry of Labour, Industrial Relations, Employment and Training.

E. In Reply to Disputant's averments in her Statement of Case, the Respondent:

- I. Admits paragraphs 1, 2 and 3 of the Disputant's Statement of case.
- II. Denies the averments contained in paragraph 4 of the Disputant's Statement of case and puts the latter to the strict proof thereof. Disputant is further referred to paragraphs B, C D 1 to 17 above. The Respondent further avers that the Disputant had on the over and above the warnings issued to her as averred in paragraph D 14 above, was issued with a Warning in 2007 for "not abiding by billing procedures", a Severe Warning in 2010 for "negligence, lack of control and no supervision from your part", a Warning in 2011 for "using rude language" and a Severe Warning in 2017 for "unauthorised use of clothing items displayed for sale at the Hotel".
- III. Strenuously denied the averments contained in paragraph five of the Disputant's Statement of Case. The Respondent further avers that the Disputant concocted the whole issue pertaining to the wearing of 'Tika' in 2018 after she would be deprived, in March 2018, of the discretionary profit sharing bonus paid by the Respondent following her improper conduct and Severe Warning issued to her in 2017.
- IV. Save and except that the Disputant refused to acknowledged receipt of the warning issued to her in person, the averments contained in paragraph 6 of the Disputant Statement of Case are strenuously denied and the Disputant is put to the strict proof thereof. The Respondent further avers that the said warning was then issued to Disputant by registered post.



- V. Is not aware of the averments contained in paragraph 7 of the Disputant's Statement of Case, refuses to admit same and puts the Disputant to the strict proof thereof.
- VI. Save and except the said Warnings were unjustified, Respondent admits paragraphs 8 and 9 of the Disputant's Statement of Case. The Respondent further avers that the said warnings were then issued to Disputant by registered post.
- VII. Save and except that the said letter was sent to Disputant, Respondent denies the averments contained in paragraph 10 of Disputant's Statement of Case. The Respondent further maintains all the averments contained in the said letter and reserves its rights to take all appropriate legal action against Disputant in due time.
- VIII. Admits paragraph 11 of Disputant's Statement of Case.
- IX. Denies paragraphs 12, 13 and 14 of Disputant's Statement of Case.

F. The case of the Disputant:

- i. The Respondent avers that it has not in any acted in breach of the terms and condition of Disputant's Contract of Employment nor acted any discriminatory manner against the Disputant and/or any other of its employees.
- ii. In conformity with section 4 (5) of the Employment Rights Act 2008, as an equal opportunity employer, the Respondent has treated all its employees in the same, fair and equitable manner. All external/visible accessories whether it is a 'tika' or a beard or dreadlocks or long hair or pony tail or hair colouring or burka or mehendi and others are strictly prohibited.
- iii. Making an exception for one employee while depriving the others from such privileges would then amount to discrimination and unfair treatment.
- iv. For the reasons set out above the Respondent moves that the Disputant's case be set aside.

## **Testimonies**

### **For the Disputant**

**Mrs Sooleka Dalwhoor**

Disputant testified that she started working as Sales Assistant in the *boutique* selling decorative accessories, beachwear items and souvenirs of Mauritius at the Respondent's hotel in May 2004 and produced her contract of employment (Document A).

She signed a further contract with the Respondent in relation to an amendment to commission earned from 1% to 0.5%. She started wearing the tikka ever since she got married i.e. November 1998. No issue was raised when she was being interviewed for the job and she has always been wearing the tikka at work. She maintained that in none of her contracts of employment has there been mentioned of the tikka. The documents she received on 21<sup>st</sup> and 29<sup>th</sup> March 2018 refer to grooming aspect with no reference to tikka. In May 2016, when the owner of the hotel, a Singaporean visited the *boutique* at the hotel, the latter did not reproach her anything about the tikka.

In 2012, Disputant was made Star of the Year for best Employee of the Department. In 2012, when she signed a further contract with her Employer, there has been no mention of the tikka. In 2016, she was nominated Employee of the month and was invited to a lunch on that occasion. The nomination was in relation to the month of September 2016. She admitted having received some warnings in the past regarding her performance at work and maintained this has nothing to do with wearing the tikka. It was as from 28<sup>th</sup> February 2018, that she started having complaints regarding the tikka. The Human Resource Manager, Miss Wazeerah Badurally Adam came towards her and asked her to remove the tikka. Disputant was stunned

and told her this is a sacred marital symbol. She was aware that the restriction on tikka applied only to employees in the Kitchen Department and she is not posted in that department.

On 15<sup>th</sup> March 2018, the Head of Department informed her that a warning will be issued to her. Disputant continued wearing the tikka and received 3 consecutive warnings on 24<sup>th</sup> March 2018, 29<sup>th</sup> March 2018 and 10<sup>th</sup> April 2018. She refused to sign all of them and it was eventually forwarded to her by post. On 24<sup>th</sup> March 2018, it was the Financial Controller, Mr Prakash Jugan who asked her to accompany him to an office where one Mr Akshay Ramchurrun, Human Resource Operation Manager, was present. When Disputant asked to be accompanied by her Head of Department, she was told that the Head of Department was absent. She further asked for a Head higher in the same hierarchy to be present but was told that that Head also was absent. While in the office, she was issued with a warning in writing with regard to the wearing of tikka. She did not sign it and left the office. She gave a declaration to that effect that she was being sequestered.

On 29<sup>th</sup> March 2018, the Head of Department, Miss Lovena Radhakisson asked her to attend her office and in presence of the Financial Controller, Mr Prakash Jugan and Mr Akshay Ramchurrun a second warning in writing was issued to her and she refused to sign. A final warning was issued on 10<sup>th</sup> April 2018 in presence of the same persons. She still refused to sign it and it was sent to her by post.

She received a further correspondence from her Employer with regard to leakage of information. She denied having anything to do with any leakage. She denied being aware of any extrapolation of the policy from the kitchen to Food and Beverages

Department and to everyone in general. She was never informed either verbally or in writing. She denied that as from year 2013 this policy existed. She never agreed to remove the tikka when being asked by the Employer. She was even wearing the tikka when having lunch with Management and produced a photo to that effect and which photo was even posted on facebook. She further denied that her motive in lodging a complaint at the Ministry of Labour and Industrial Relations is based on the fact that she did not receive a profit sharing bonus.

She added that even prior to 2018 there was a time when she did not receive the bonus. She is now asking the Tribunal that she be allowed to wear the tikka and that the warnings issued to her in relation to the wearing of the tikka be withdrawn.

**Mrs Usha Bugoo**

She works at the department of Food and Beverage at the hotel. She is not aware of any protest on behalf of employees at the Food and Beverages Department regarding the tikka issue. She received a warning for wearing a tikka on the 24<sup>th</sup> March 2018 and did not have any problem regarding the profit sharing bonus issue.

**For the Respondent**

**Miss Bibi Wazeerah Badurally Adam**

According to her testimony, this witness is employed as Corporate Human Resource Manager at The Residence Hotel since 14<sup>th</sup> February 2011. She stated that in the contract of employment of the Disputant, it is stipulated at paragraph 9 that the employee should strictly observe and abide by all internal rules of the company which are presently in force and which may be altered from time to time and furthermore any violation of these rules by the employee will be met by disciplinary action. Paragraph 9(c) refers to the other condition of employment together with Rules and Regulations of the company as described in the *Employee Handbook*, to which the employee should be fully conversant.

The witness referred to a document “*Our Itinerary to Success*” and Disputant was remitted a copy of it on the 22<sup>nd</sup> April 2004. There is also a *Hotel Property Distribution Form* on which an employee confirms having received a document. The witness described the various requirements regarding personal grooming and appearance of employees and with regard to kitchen staff, she stated that the document specifies that no jewelry is allowed and that includes a tikka for female employees during working hours. This is in accordance with the Food and Safety Act 2000. Also there is the *Hazard Analysis of Critical Control Point* for the kitchen. It is an international rule that guarantees a certain hygienic standard in the kitchen. It is the SGS Company that does the control.

The banning of wearing the tikka has been extended to the employees in the Food and Beverages Department. The witness stated that following certain complaints received, Management found out that the banning of the tikka in the kitchen and Food and Beverages Department was a discriminatory measure and it therefore extended it on all employees across at the hotel. According to her, such discrimination was against employment law following advice Management

received. She maintained that all employees of the hotel were made aware of such change. First of all, new entrants are told of the hotel's policy at the induction meeting and also all employees go through a continuous exercise during a refresher course. The policy was also affixed on a notice board in front of the canteen and more particularly at the employee's entrance. The witness spoke of the philosophy of the hotel, which pertains to maintaining a five star standard. It has to satisfy grooming practice requirements at international level. While agreeing that the tikka is elegant, she specified that the hotel emphasises on the display of natural beauty. The tikka being a visible item, it cannot be displayed. She confirmed that Disputant has been working at the hotel since 2004.

In February 2018, she saw Disputant wearing the tikka at the hotel and she warned her that she should stop doing so. Disputant resisted. A series of warnings in writing were forwarded to her. When Disputant referred the matter to the Ministry, it was decided on the 13<sup>th</sup> April 2018 that the Respondent would put on hold a Disciplinary Committee that was to take place with regard to Disputant's refusal to comply. The witness then elaborated on the issue of profit sharing bonus, whereby Disputant did not receive her bonus in the year 2018 following a severe warning that was issued to her in 2017 for gross misconduct. She also referred to photos where Disputant was not wearing the tikka. Lastly, she confirmed that Disputant had not received the profit sharing bonus in 2011 and that Disputant is currently a good employee. In another contract issued to Disputant in 2012, there was no mention of the banning of the tikka to all employees. The wearing of the tikka has had no negative impact on the financial status of the hotel.

**Mr Prakash Jugan**

This witness is the Financial Controller at the Respondent's hotel since 2015. He took cognizance of the grooming policy at the hotel in his contract of employment to which there is a booklet attached. There is also an induction meeting where the hotel's philosophy is explained, in particular the grooming standard expected. He gave a description of the various grooming and attire to be followed by every employee. The witness also explained the profit sharing policy at the hotel, which is based on the hotel's performance. As regard the tikka issue, he maintained that there is a ban on it based on the principle of neutrality and mention of its banning is made at the induction and training courses. He issued a warning letter against Disputant in February 2017.

In February 2018, the Human Resource Manager asked Disputant to remove a tikka she was wearing and it was in his presence that Disputant refused to do so. Three consecutive warnings were issued to the latter. He confirmed that no client ever complained about an employee wearing a tikka. The salutation done by an employee in welcoming guests at the entrance is similar to the Namaste greeting but it is not Namaste.

**Mrs Rebecca Mally**

This witness has been working at the hotel since November 2016 and stated that reference is made to tikka during the induction course. She also delivered lectures during those courses and she informed employees that the wearing of tikka is not

allowed. She could not say whether Disputant attended any of those courses and she even added that she does not have any proof to that effect. She confirmed that in the hotel's handbook mention is made of the banning of tikka for employees of the kitchen and that is for health and safety reasons. She did not inform employees that wearing of tikka would lead to disciplinary action.

## **Submissions by Parties**

### **Respondent's submissions**

Counsel for the Respondent submitted that The Residence Mauritius is a five star hotel, which has been in operation since 1998. It currently employs some 400 employees on a full time basis. In the contract of employment, it is written at paragraph 9(b) that the employees are to strictly observe and abide by all internal rules of the company which are presently in force and which may be altered from time to time. Any violation of these rules by an employee would be met by disciplinary action. Paragraph (c) refers to conditions of employment together with the rules and regulations of the company as described in the "*Employee Handbook*". This is entitled "Itinerary to Success". When an employee joins the Company, he or she has to go through an induction course where the dressing code is explained as well as grooming in general. There are also regular trainings to refresh their memories. Originally, the prohibition on wearing the tikka was limited and restricted to kitchen staff and that was in 1998 when the hotel came into operation and this is in accordance with the *Hazard Analysis Certificate Control Point* which imposes on all hotels certain limitations.



Eventually and without any regulation, the Respondent thought it appropriate to maintain a certain level of service of a five star hotel to ban completely the wearing of the tikka. It further submitted that there have been complaints from staff of Food and Beverages Department as to why some employees at the hotel are allowed to wear tikka and others are not. Counsel highlighted that with the introduction of the Employment Rights Act in February 2009, it has become an offence for employers to discriminate against employees. He expatiated on section 4(5) of the Act, in relation to discrimination. He added that the wearing of the tikka pertains to a specific religion although here it is not an issue of one religion against another and *stricto sensu* the wearing of the tikka does not fall within the provisions of the Employment Rights Act. In fact, the hotel started banning all accessories that pertained to all religion.

Counsel expatiated lengthily on the motive that led complainant to complain about the banning of the tikka. This is in relation to the profit sharing bonus, which she did not receive in the year 2018.

### **Disputant's submissions**

Disputant's Counsel submitted that Disputant has been employed by the Respondent as Sales Assistant since 2004. Disputant signed two employment contracts, one in 2004 and one in 2012 with the Respondent. Both contracts are similar except for an adjustment in the commission payable. Counsel referred to the various documents that formed part of the contract. Although the contract provides for possible amendments to the contract itself, at no point in time did Disputant sign any document confirming that she did take cognizance of the 2013 alteration. There is no evidence of any notice being put on the board regarding alteration to the contract

whereas in the handbook specific mention is made regarding a ban of the tikka in the kitchen. Counsel wondered as to why the Disputant was allowed to wear tikka during the marketing campaign in September 2017. That Disputant was not wearing a tikka at some stage at her place of work adds nothing to the Respondent's case. The point remains that the Respondent allowed her to wear it for the job fair. Counsel further submitted that there were no written rules that banned the wearing of the tikka across the board. Also, there was no proper communication. Disputant was taken to task and was warned. She even risked losing her job, following rules unknown to her. Counsel submitted that with regard to *modification substantielle* of the contract, the question that needs to be asked is whether there was any modification at all?

Counsel referred to the issue of dispute and submitted that in the present case there is no discrimination. It is not a question of one employee being of a particular faith as opposed to one of another faith. We are here referring to all people of the same religious faith and the definition of discrimination does not cover that kind of discrimination as provided for in section 4 of the Employment Rights Act. With regard to the issue of profit sharing bonus, Counsel submitted that there is no motive in relation to it. Lastly, Counsel referred to the testimony of witness Mr Prakash Jugan who admitted that although mention is made of severe disruption in his letter to Disputant, there was in fact no such disruption at the hotel.

### **Analysis of law and facts**

Before analysing the legal issues, the Tribunal finds it appropriate here to recite the material facts and the issues raised to enable a proper determination of the matter.

At the time Mrs Dalwhoor has joined service at the Respondent, the contract of employment which she signed, besides mentioning her terms and conditions of employment, referred to an Employee Handbook which amongst other things, an elaborate description of the grooming standards to be followed by employees and mentioned a plethora of grooming accessories that are specifically prohibited on work premises. In so far as the tikka was mentioned therein, it was prohibited only for food handling staff and not the whole department such that Mrs Dalwhoor did not fall under the prohibition on tikka.

It is not contested that the prohibition on the wearing of the tikka came well after Mrs Dalwhoor was employed by the Respondent, that such prohibition was initially applicable only to kitchen staff Department but later extended to the Food and Beverages Department and eventually to the whole Hotel. It is alleged that such change in policy was affixed on a notice board at the canteen and communicated via training sessions on grooming though no evidence has been brought to the attention of the Tribunal to confirm same. Both the spa manager, Mrs Mally, who is responsible for delivering such training sessions and Mr Jugan, who administered the warnings to Mrs Dalwhoor, were unable to provide evidence that the policy change had been brought to the attention of Disputant.

Furthermore, it is not disputed that the contract of employment of Mrs Dalwhoor provided for the terms and conditions of employment to be “*altered from time to time*”. Mrs Dalwhoor not only was not notified of the change in policy brought by the Hotel but she also did not assent in any manner whatsoever thereto. The evidence

is clear that she has, despite being served with three warnings which culminated into a “*last and final*” warning, persistently continued to wear her tikka at work. None of the protestors was called to confirm same.

One must also consider the evidence concerning Respondent’s motivation behind the policy change. All representatives of the Respondent stated under oath that the reason behind it was the desire of Management to ensure a uniform treatment in its workforce by prohibiting all female staff indistinctly from wearing the tikka. They also tried to justify this position by relying on the anti-discrimination provision brought by the labour legislation of 2008 and also by the fact that there was an alleged protest from some staff members who despite not being food-handlers were yet prohibited from wearing the tikka at that time. None of the protestors was called to confirm same.

In **Bright Knitwear Co. Ltd v Dussaruth [1986 MR 109]**, the Supreme Court, held *inter alia* that a worker has certainly no right to contest a clearly lawful decision of Management but must have the right to contest once the legality of which is not so apparent.

The material facts as rehearsed give rise to the following issues which are to be addressed in law. Firstly, the employer’s power as conferred under the contract of employment to unilaterally alter the terms and conditions of employment of the Disputant. Secondly, the nature of such alteration and whether it was not such as to warrant an assent on the part of the Disputant. Thirdly, the contention that the extension of the banning of tikka was because of an alleged need for equal treatment of all employees at the workplace needs to be addressed in the light of the relevant laws on anti-discrimination. And further, given the specific circumstances in which

the change in policy was communicated, the Tribunal proposes to deal specifically with that issue given its duty under the law to examine the conduciveness of labour practices to good industrial relations and to try to mend deteriorating industrial relations when such practices are deemed unfair.

In order to analyse the above issues, it is apposite to consider the case of **Cayeux Ltd v De Maroussem [1974 SCJ 82]** which provides an authoritative analysis on reconciling the “*force obligatoire du contrat*”, a basic tenet of our “*droit des obligations*”, with an employer’s power to unilaterally alter an employee’s contract of employment. The analysis is reproduced below though the Tribunal stands minded of the fact that in the present case, the Tribunal is not concerned with declaring void the contract of employment but whether such modification of the kind described above is of such nature as to require the assent of the employee.

“... One of those general precepts of our law of contract is that covenants legally entered into cannot be revoked except by the mutual consent of the parties thereto (article 1134 c. nap), and another that the failure by one party to a contract to perform his part of the agreement gives a right to the other to ask for its annulment (article 1184. c. nap). The effect of those provisions would be that any unilateral modification by an employer of the conditions of a contract of employment of indeterminate duration may entitle the worker to treat the agreement as at an end (**Vacoas Transport Ltd v Pointu [1970 MR 35]**).

The rest is a matter of application, each case having to be decided on its own merits ... Counsel for appellants laid stress on the right of the employer (a right which has been consistently upheld by those courts) in the discharge of his responsibility to ensure the efficient running of the undertaking, to modify the organization of his services and the functions of his employees. The correctness of that proposition cannot be doubted.

But the principle which it involved is not absolute and must be balanced with the countervailing principle stated just before. Here again the success of an employer's contention founded on his right to reorganise will depend on the circumstances; the Court being called upon to decide whether the employer's action comes within the legitimate exercise of that right or amounts to such a modification of the employee's contract as to constitute a termination of that contract..." (emphasis added)

One must also refer here to the case of **Raman Ismael v United Bus Service [1986 MR 182]**:

"... it is settled law that 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..."

Dr Fok Kan in his *Introduction Au Droit Du Travail Mauricien* at pages 304 – 305 (2<sup>nd</sup> edition) commenting on the above cases made the following analysis which is relevant to the present matter-

"Ceci [right of the employer] peut éventuellement avoir pour effet de permettre à l'employeur de modifier le contrat de travail. Ce pouvoir étant dérogatoire au principe du droit commun de la force obligatoire des contrats (article 1134 du code civil), il est clair que ce pouvoir doit comporter certaines limites. Ces limites se situent d'abord au niveau du caractère de la modification et ensuite au niveau de la procédure à suivre.

Ces arrêts classent ainsi les modifications dans deux catégories, les modifications substantielles et les modifications non-substantielles.

Ceux-ci [les critères à appliquer] comportent une double interrogation. Premièrement, la modification concerne-t-elle un élément essentiel de l'accord des parties ? Si la réponse est non, la modification est non-substantielle. Si la réponse est positive, une deuxième question se présente ; cet élément est-il affecté de manière substantielle ? Si oui la modification est substantielle. Dans la négative elle est non-substantielle". (emphasis added)

In the present matter, the essence of the above analysis is that if the employer unilaterally alters an essential element of the contract of employment that is "*la modification est substantielle*", the contract is deemed not to have been respected unless there is the mutual consent of both parties such that a novated contract comes into existence. On the other hand, if the modification does not cause a material change in the conditions of employment, the employee is bound by such change given "*le lien de subordination*" whereby it is a "*subordination juridique*" and the employer has the sole discretion to issue instructions on the performance of work. It has to be determined whether we are in a situation where the employer is making a legitimate exercise of that right or exercising that right in a way that the contract of employment does not allow him to, that is to say, that right is being abused.

Therefore, one has to determine when to qualify a "*modification*" as "*substantielle*" and for that matter, reference is made to the Supreme Court decisions with the reservation that these are not factually relevant to the present matter which concerns the modification of a condition of employment that goes to the physical appearance of the employee that is her grooming and nothing of the sort that goes to the execution of the employment itself such as place of work, working hours or salary which are items pecuniary in nature or at least quantifiable in terms of the prejudice suffered.

In **A.J. Maurel Construction Ltee v Froget HRN [MR 6 of 2008]**, the Supreme Court held inter alia

*“In any case, as has been stated in Dalloz, Camerlynck, Droit du Travail (ibid.), the law does not interfere with the power of the employer to do so except that when he does so he does not interfere with the acquired rights of the employees.*

*« L’employeur, maître selon la jurisprudence de l’organisation et du bon fonctionnement de ses services, peut librement, et sans engager sa responsabilité, apporter « dans les limites de son pouvoir de direction » (des changements dans la structure de son entreprise et des aménagements dans l’exécution de la prestation de travail, ... »*

*However, when he does so, he should ensure that he does not interfere with the acquired rights of the employees. The exercise of the power of the employer to manage his business as he thinks fit is permissible:*

*« dès l’instant où il ne porte pas atteinte pour autant aux « éléments substantiels du contrat » (4) ou ne lui apporte pas de « modification essentielle (5) – concernant la qualification, les attributions principales, les conditions de travail ou la rémunération. » ”*

In **Hong Kong Restaurant Group Ltd v Manick [1997 SCJ 105]**, the Supreme Court held that the employer has an inherent power of administration. He can organise his business according to the exigencies of the service but within the boundaries of the labour law and applicable remuneration orders. However, this does not entitle the employer to fix odd hours of work unless the concern has odd business hours. Though the Remuneration Order in force provided for longer working hours, the hours of work as were originally applicable constituted was one of the terms of



employment. The change in working hours was held to be a “*modification substantielle*”-

“La durée du travail est généralement considérée comme un élément substantiel, ne serait-ce que parce qu’elle détermine le salaire.

Le salarié n’a ni à accepter ni à refuser une modification non substantielle, qui s’impose immédiatement à lui. Mais son acquiescement est nécessaire si la modification est majeure pour la formation d’un avenant au contrat du travail. Et il a le droit de refuser la modification substantielle, son refus ne pouvant justifier une sanction.”

In **Tirbanee v Floreal Knitwear Ltd [2002 SCJ 146]** where the alteration concerned the place of work, it was held not to be a “*modification substantielle*” given that “*any inconvenience as to travelling would be largely tempered by the transport arrangements made by the employer*”. The Court distinguished the facts of that case from those where “*hardship would ensue to the workers*” by a change in the place of work.

If one attempts to gauge a line of reasoning that binds together all the cases concerning unilateral modification of the contracts of employment by employers, then it would be as follows:- a “*modification*” is considered “*substantielle*” if it causes undue “*hardship*” to the employee in the execution or performance of his or her work. This is assessed with respect to what has been agreed initially between the parties at the time of entering into the covenant. It should be such as it can be said that it was not the intention of the parties to have initially agreed to be bound in the future by conditions which are totally alien to the initial agreement or less favorable as the parties may have reasonably considered to have intended initially.

Furthermore, this assessment is made from an objective point of view, that is, taking into consideration the effect of the change on a reasonable man, for example, whether the modified work time falls within “odd hours” will be objectively determined and not according to the employee’s belief that such change causes her prejudice. A “*modification*” is also not “*substantielle*” if that undue hardship it causes has been reasonably accommodated by the employee for example an increase in working hours was followed by an increase in salary or the employer makes arrangement for the employee to be transported to his new workplace.

Turning to the facts of the present matter, it is not denied that Mrs Dalwhoor has joined the service of the Respondent upon the terms that her grooming standards do not, and most probably will not in the future, include the prohibition on the wearing of the tikka. When entering into the agreement, she was aware that personal appearance is something that the Hotel lays considerable emphasis on. At that time, the prohibition on the wearing of the tikka was not applicable to her. As a result, it is not inappropriate to consider that she reasonably expected at that point in time that such prohibition would not be applicable to her in the future. The more so, she entered into an agreement with the Respondent as a Sales Assistant. Consequently, without making any speculation as to her state of mind at the time of signing the agreement, it would be unfair to imply that she may have given consideration to the fact that in the future she can be prohibited from wearing the tikka. That matter cannot have crossed her mind at that time so that we can say that she entered into the agreement upon consideration of the fact that such prohibition would not be applicable to her.

*A contrario*, it would not be unreasonable to imply that Mrs Dalwhoor, being a woman of Hindu faith, must have at that material time, directed her mind to the fact

that her wearing of the tikka will not be contested by the employer in the near future. Neither did the Hotel do so at the time of her entering into service. As a corollary, it is not inappropriate to say that she could hardly have thought of any logical connection between her wearing of the tikka and her job which consists mainly in the selling of boutique items. And that the prohibition on the wearing of the tikka which came after she signed a contract of employment as a Sales Assistant, could not be taken to have been reasonably foreseen by her. The more so as specific prohibitions on grooming and wearing accessories were imparted to her via the Employees Handbook, which is collateral to her contract, and she entered into the agreement upon the terms to be so bound.

In so far as such modification causes undue hardship to her, that is, as she confidently stated under oath that the tikka is a symbol of her status as a married person, one must concede that such hardship does not arise in the execution of her work such that her work becomes more onerous compared to what was originally intended. Even if we are prepared to admit that her consent to the modification was not necessary, one cannot ignore the emphasis laid by Counsel for the Disputant to the effect that no prejudice is being caused to her work by the wearing of a tikka. Witnesses for the Respondent conceded that the wearing of a tikka in no way hampers the work of the Disputant, her sales level and the profitability of the Hotel. On that analysis the issue centers more on whether the “the employer’s legitimate exercise of its right”, if one is to admit this proposition and rejects the issue of the ‘substantiality’ of the policy change, is reasonable in the circumstances, that is, the undisputed inconvenience caused to the Disputant is proportionate to the results sought to be achieved by the Respondent in the performance by the Disputant of her duties.

The evidence of the Respondent discloses only two interrelated, if not one, vague reason(s) for the prohibition of the tikka. Witnesses for the Respondent testified that the principle of neutrality is applied by the Respondent and when they were questioned thereon, they tried to explain, though in an unconvincing manner, that the Respondent wants all its employees to be portrayed to clients in a ‘natural’ manner. They used examples like natural hair colour, same coloured socks i.e brown, light makeup that only reveal the natural colour of the skin, same colour uniforms, amongst others. The other reason is that such prohibition must be applicable to all employees in order for Management not to fall foul of the anti- discrimination provision of the labour legislation.

Counsel for the Respondent submitted that Section 4 of the Employment Rights Act must be given a wide interpretation and the Tribunal must read into it the principle of equal treatment in the sense that all workers in an enterprise irrespective of their distinct occupations must have the same rights and obligations, besides those concerning remunerations and scheme of duties. That is, grooming standards that prohibit the wearing of certain accessories are to apply indistinctly to the whole workforce even though some operations are not affected by the wearing of such accessories. This wide claim for the sake of removing ‘discrimination’ is, in our view, misconceived given that Section 4 of the Employment Rights Act of 2008 specifically mentions some grounds upon the basis of which discrimination between workers are prohibited. The relevant sections are reproduced below-

#### ***4. Discrimination in employment and occupation***

*(1) (a) No worker shall be treated in a discriminatory manner by his employer in his employment or occupation.*

*(2) Any distinction, exclusion or preference in respect of a particular occupation based on the inherent requirements thereof shall not be deemed to be discrimination.*

*(3) A person does not discriminate against another person by imposing, proposing to impose, on that other person, a condition, requirement or practice that has, or is likely to have, a disadvantaging effect, where the condition, requirement or practice is reasonable in the circumstances.*

...

*(5) For the purpose of this section –*

*(a) “discrimination” includes affording different treatment to different workers attributable wholly or mainly to their respective descriptions by age, race, colour, caste, creed, sex, sexual orientation, HIV status, religion, political opinion, place of origin, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.*

That section begins with the principle of non-discrimination at the workplace which in principle is then qualified by a series of sub-sections. It then distinguishes discrimination from a mere distinction that is based purely and simply on the inherent nature of the work that justifies such distinction. It also explicitly provides that the mere fact that a regulation made by an employer has an unfavourable effect on an employee does not entitle the latter to plead discriminatory treatment when such regulation is considered “reasonable” taking into account the specific circumstances of the case. There is here an element of proportionality whereby an alleged act by the employer is still considered non-discriminatory if the results

sought to be achieved by the employer is dictated by the requirements for the performance of the work of the enterprise and such consideration outweighs any disadvantage caused to the employee in the sense that the act is justified. Above all, there is discrimination only if such is based on specific grounds like sex, creed, religion amongst other limited grounds.

Counsel for the Respondent has made it clear to the Tribunal that the issue of wearing of the tikka has never been a religious issue at the Hotel and neither addressed the Tribunal on any of the grounds included in Section 4 so that section does not find its application here.

We refer here to an award delivered by the Tribunal in **K. Manraknah and The One & Only Le Touessrok Hotel [ERT/RN 06/11 of 31.10.2011]:-**

*“It is apposite to quote from the award of **G. Rousseau &ors and Le Warehouse Ltd (RN 1013 of 2010)**, which was followed in the award of **The State Bank of Mauritius Staff Union and SBM Ltd (RN 1001 of 2010)**, in relation to **section 97**:*

*“On the principles of good practices of good industrial relations as provided for in section 97 of the Employment Relations Act, it is essential that there should be an ‘entente’ between the Employers and the Employees. Good human relations between Employers and Employees are essential to good industrial relations.*

*One should not lose sight of the fact that both Employers and Employees have a common interest in the success of the undertaking.”*

*“...it is akin to note what was stated in **Police v Rose [1976 MR 79]**:*

*“To differentiate is not necessarily to discriminate. As Lysias pointed out more than 2, 000 years ago, true justice does not give the same to all, but to each his due: it consists not only in treating like things as like, but unlike things as unlike. Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently.”*

This approach has been followed in ***Rodrigues Government Employees Association & Ors. v The Government of Mauritius*** [2000 SCJ 375], where in an action claiming that the defendant’s employment policy discriminates against public officers who originate from and are residents of Rodrigues, it was held that the policy does not amount to discrimination but constitutes a mere differentiation which is perfectly justified; and has been expressly endorsed by the Judicial Committee of the Privy Council in ***Matadeen v Pointu*** [1997 PRV 14; 1998 MR 172] (vide ***Bishop of Roman Catholic Diocese of Port Louis v Tengur*** [PCA No. 21 of 2003; 2004 MR 197]).”

The Tribunal points out that we are not here faced with a situation where the wearing of the tikka has been allowed for workers of one religious belief and prohibited for others of another faith or that the wearing of tikka has been prohibited while workers not of the Hindu faith are being allowed to wear accessories in line with their religious prescriptions and which are reasonably comparable to the tikka. Consequently, the submission of Counsel for the Respondent does not sit comfortably with the prescription of the law and this we say so respectfully.

Therefore, this labour dispute as has been referred to this Tribunal has got no connection whatsoever with any ‘discriminatory treatment’ being perpetrated by the employer. Having clarified the above, the Tribunal still finds it appropriate here to

discuss the issue of proportionality of the change in policy to the disadvantage caused to the Disputant in the light of the operational exigencies that may have enabled the employer to regulate as such.

If one, for the sake of argument, turns to the **Food Act of 1998** which regulates businesses dealing with food in Mauritius, it is clear from an analysis of that Act that an offence may be committed amongst other situations, when for example, a business (“*any institution*”) undertakes a “*commercial operation*” which includes the selling and distributions of food, and a “*foreign matter*” like a tikka, for example is found in that food. Furthermore, where an authorized officer under that Act is of the opinion that “*the preparation, cooking or selling of food at any premises... constitutes a hazard to health*” or that the “*manufacture, production, packaging, preparation, storing or selling of food*” on the work premises constitute “*an imminent hazard to health*”, that officer may issue a prohibition order or an emergency closing order depending on the circumstances.

Although we are not here seized of a specific case under the Food Act, the Tribunal is satisfied that the wearing of the tikka by Mrs Dalwhoor will not in any way cause the Respondent to be in default of its obligations under the Food Act. Witnesses for the Respondent themselves conceded that the working operations of Mrs Dalwhoor do not involve any contact whatsoever with food items being manufactured, stored or delivered by the Respondent so that even if the contention of the Respondent had been that the wearing of the tikka by Mrs Dalwhoor poses an “imminent hazard to health” of the clients, that proposition was bound to fail. The Tribunal not only fails to see how an employee selling beach wear and other souvenir items in a boutique at the Hotel can be a health hazard but also how the prejudice caused to Mrs Dalwhoor by such prohibition is justified by the need to be “neutral” or “equal” to



everyone when at the very outset, the nature of the occupations of respective employees differs.

The proper running of the Hotel in terms of productivity of employees, efficiency or even in terms of revenue generated is not affected by the wearing of the tikka. It does not prejudice the Hotel's interests. Considerations of fairness or reasonableness make it such that on a balance of probabilities, the prohibition on the wearing of the tikka comes less within the employer's legitimate exercise of its right to discrimination and more towards undue hardship being caused to the Disputant which hardship the Tribunal has found, cannot be justified by the operational requirements at the Hotel. No evidence was adduced to prove that the wearing of the tikka detracted Disputant's in any way from the performance of her duties as Sales Assistant in the *boutique* and therefore that it negatively impacted on it. There existed no rationale connection between Disputant's work and the measure taken. Indeed the Hotel would have suffered no unreasonable burden had it allowed Disputant to wear the tikka.

The Tribunal wishes to highlight also that the tikka as submitted by Counsel for the Disputant is only 1mm in diameter and when taken in proportion to the dimension of the face of an average human being, it is hardly visible when coming face to face with a client. The employer's right to impose the principle of 'neutrality' on its workforce in the light of the exigencies of its operations is not denied. However in the light of the foregoing, it is not too far-fetched either to say that the wearing of the tikka causes a negligible disruption or no disruption at all to the principle of neutrality applied by the Respondent.

The question that must be asked with respect to those employees who do not handle food is whether there is an alternative other than to refrain completely from wearing the tikka. If any, the employer could have reasonably accommodated it. But the regulation of the Respondent is such that all employees indistinctly must be 'neutral' in appearance. It is apposite to note the example of an indeed reasonable accommodation in the evidence of Mr Jugan. He testified that employees of the Hindu faith who wear a sacred red chord around the wrist are provided with long sleeves uniform to cover it. Nonetheless, in the case of a tikka worn by an employee who does not handle food, the possibilities are either to accept the prejudice caused to the employee by prohibiting the wearing of the tikka, which is barely visible on the face, yet interfering minimally with the Respondent's principle of 'neutrality'. Such interference is, however, with respect to its standards only and not its operational requirements as the Tribunal has found above. Which of the two is a lesser prejudice is something to be determined by the employer who has sole responsibility in ordering its operations though considerations of fairness tend to favour the latter and this, for the reasons mentioned above. Besides Disputant's motive for bringing up the complaint is extraneous to the present dispute.

Above all, the Tribunal stands minded of the way such decision on the prohibition of the tikka was imparted if at all, to the employees. Though the contract of employment of the Disputant provided for conditions of employment to be altered from time to time and even if one admits that such change was not a substantial one requiring the consent of the employee, it appears most unusual, not to say markedly irrational, the way in which the Hotel is imposing its decisions on its employees. Respondent averred that, Management made a strong resolution on the need for equal treatment after an alleged protest by employees but in the end it deemed it not so important to circulate that 'important' decision to each employee in a way to

strictly enforce its grooming standards. Moreover, had it intended to strictly apply and observe such prohibition, Mrs Dalwhoor would not be found wearing a tikka on several occasions on the Hotel premises as has been demonstrated in the photos produced by the Disputant, one of which was even published on a social media platform that is accessible to the public in general. Respondent which claims to be a five star Hotel, cannot afford such superficial communication between its Management and its workforce when it comes to a grooming standard which Management has deemed fit to impose sanctions for non-compliance but yet considered it of lesser importance when it comes to communicating it.

It is apposite here to refer to Dr D. Fok Kan in his Introduction Au Droit du Travail Mauricien at page 217 (2<sup>nd</sup> edition):-

**“L’Abus du Pouvoir de Direction**

La sanction de l’abus du pouvoir de direction peut se situer soit au niveau du mécanisme régissant les relations industrielles, plus particulièrement devant l’Employment Relations Tribunal ou alors au niveau judiciaire.”

We will deal as a matter of relevance with the process before the Employment Relations Tribunal.

“Il convient de faire ressortir que les considérations de l’ERT sont différentes de celles d’une cour de justice. Il s’agit ici de litige où la solution ne dépend pas nécessairement d’une approche légaliste. Parmi les principes dont l’EAT on a faire application nous retrouvons non seulement les intérêts des personnes concernées mais également ceux de la communauté dans son ensemble et les principes et les pratiques conduisant à une bonne relation industrielle. C’est ainsi que le PAT se réfère volontiers dans *In Re : Mrs*

*D.C.Y.P and The Sun Casino Ltd* aux "fundamental principles of fair employment" pour résoudre le litige.

Quels sont toutefois les critères du détournement de pouvoir ? Deux conceptions ont été ici proposées. Premièrement il y aurait détournement de pouvoir toutes les fois où l'exercice de ce pouvoir n'est pas conforme à l'intérêt de l'entreprise. Selon la deuxième conception il ne s'agit pas de "vérifier que cette décision était conforme à l'intérêt en vue duquel le pouvoir est reconnu (mais) de vérifier que, dans l'intention du titulaire du pouvoir, la décision a été prise dans cet intérêt". Il s'agit ainsi d'examiner le mobile du chef d'entreprise. La jurisprudence française a adopté la deuxième conception. C'est probablement également cette conception que le PAT a adoptée dans l'espèce *In Re : Mrs D.C.Y.P and The Sun Casino Ltd* et dans l'espèce *In Re : Mootoosamy and The Bank of Baroda Ltd*. Dans les deux cas, le PAT met en effet l'emphase sur l'intention malveillante du chef d'entreprise : "There is no doubt that employers do have a discretion and powers in matter of appointment and promotion. Such discretion and powers must, however, be exercised in such a way as not to cause prejudice and frustration to employees whose only "fault" would seem to be loyalty, expertise and efficiency... After considering all the facts of this case, we have no hesitation in finding that the fundamental principles of fair employment have not been followed and that, as a result, one employee is feeling justly frustrated because of what she considers, and is considered, an "injustice" with consequences affecting her not only materially, but morally. Emphase est mise par le PAT sur "such a novel transfer procedure which consisted in requesting a car driver to inform verbally an employee the previous evening that she must report to another Casino the next day. To say that this process is most cavalier can be euphemistic". Inversement c'est probablement l'absence d'une intention malveillante dans l'affaire *Pottier v Ireland Blyth Ltd* qui permet au PAT de rejeter les prétentions de l'employé. Ces cas démontrent clairement que même le PAT refuse d'intervenir sur une simple question d'opportunité. On sera plutôt surpris si la Cour Industrielle ou la Cour Suprême devaient accepter de le faire."

The above view is reinforced when one takes note of **Paragraph 73** of the **Code of Practice** included in the **Fourth Schedule** of the **Employment Relations Act 2008** as amended-

**73.** Management shall avoid impersonal forms of communication, especially when dealing with important and sensitive issues.

The Code of Practice, according to **Section 35** of the Act, provides practical guidance for the promotion of good employment relations. Though a failure on the part of an employer to observe any provision of the Code of Practice shall not of itself render that person liable to proceedings of any kind, any provision of the Code of Practice which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account for the purposes of determining that question. The Tribunal has deplored the unfairness in the way the change in policy was communicated, if at all, to the employees. We find that such mode of communication also falls foul of Paragraph 73 of the Code of Practice which the Tribunal considers is relevant to the present issue for the reasons mentioned below.

Firstly, the Tribunal is of the opinion that a regulation which prohibits the wearing of tikka indeed falls within the province of a “sensitive” issue. The wearing of tikka by married women of the Hindu Community is a commonly known practice that is well received in the Mauritian society. Such practice has been carried out for centuries and as such, it is a tradition for married women of the Hindu faith. The Tribunal had the opportunity to hear Mrs Dalwhoor on the importance of her belief in the wearing of a tikka and such belief has not, in any manner whatsoever, been denied or even questioned by the Respondent. She stated under oath that the tikka symbolizes her marital status and the practice of wearing same is an expression of

her marital status. The tikka is considered as an epitome of her identity as a married person.

Secondly, on the issue of “importance” of the policy change, that has been adequately canvassed by the Respondent itself. The witnesses for the Respondent testified that the Management of the Hotel uncompromisingly wanted to eradicate all ‘discrimination’ whatsoever in the Hotel after receiving several protests from those who were prohibited from wearing the tikka. The Respondent itself laid strong emphasis on the importance of abiding by the principle of ‘neutrality’.

On the whole, the Tribunal cannot but adopt the view that the communication of such an “important and sensitive” issue should not have been via a mere display on notice boards at the entrance of the canteen at the Hotel. When a policy change is communicated as such, the Tribunal doubts whether it was meant by Management of the Hotel to target each and every employee of the Hotel or only those employees who happen by chance to have passed by the canteen at that moment in their free time. At the training sessions, Management could have assured itself that each and every employee is apprised of such policy change by requiring them to sign a circular if it considered its decision to be an important one. But no evidence has been adduced to prove the communication of the policy change besides the mere statement of the witnesses for the Respondent that such prohibition on the wearing of the tikka was ‘explained’ to those attending the training sessions.

At any rate, Mrs Dalwhoor stated under oath that she was not aware of such policy change and the spa manager who testified for the Respondent conceded that she cannot state whether Mrs Dalwhoor was in attendance when the prohibition on the wearing of the tikka was being addressed in the training session. It is our considered

view that such communication of the kind made by the Respondent falls in the category of “impersonal forms of communication”. It has been addressed in a general manner and not specifically to each employee. It is exactly such form of communication which must be “avoided” if one is to foster good industrial relations.

Counsel for the Respondent submitted that the reasoning of the **United States Court of Appeals- First Circuit [No. 04-1475]** in the case of **Cloutier v. Costco Wholesale Corp.** may persuade the Tribunal to adopt the contention of the Respondent. This was an appeal under the Civil Rights Act of 1964 which “prohibits employers [their policies] from discriminating against employees on the basis of, among other things, religion”. Under Title VII, “an employer must offer a reasonable accommodation to resolve a conflict between an employee’s sincerely held religious belief and a condition of employment, unless such accommodation would create an undue hardship for the employer’s business”. The Respondent (Costco) had prohibited the Appellant who works as a cashier, from wearing her eyebrow piercing. Appellant averred that she is a member of the Church of Body Modification whose goals, amongst others, were to require its members “to be confident role models in learning, teaching and displaying body modification”. Cloutier interpreted this to mean that “her piercings should be visible at all times and precluded her from removing or covering her facial jewellery”. She appealed against the District Court which gave summary judgment for the Respondent.

The Court of Appeals after assessing the hardship caused to the Respondent, affirmed the judgment of the lower court and made the following remarks:

“...The district court acknowledged that “Costco has a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance...[according to Costco’s dress code]All Costco employees must practice good grooming and personal hygiene to convey a neat, clean and professional image... [Costco’s] facial jewelry influenced Costco's public image and, in Costco's calculation, detracted from its professionalism.

As the D.C. Circuit noted, “Perhaps no facet of business life is more important than a company's place in public estimation... Reasonablerequirements in furtherance of that

policy are an aspect of managerial responsibility.” Courts considering Title VII religious discrimination claims have also upheld dress code policies that, like Costco's, are designed to appeal to customer preference or to promote a professional public image. E.g., *Hussein v. The Waldorf-Astoria*, 134 F.Supp.2d 591, 599 (S.D.N.Y.2001) (“Some courts have found that clean-shavenness is a bona fide occupational qualification in certain businesses and, in those situations, as long as the employer's grooming requirement is not directed at religion, enforcing the policy is not an unlawful discriminatory practice.”), *aff'd*, 31 Fed.Appx. 740 (2d Cir.2002) (unpublished)...” (emphasis added).

The Tribunal wishes to point out that this was a case under a legislation which *inter alia* provides for the possibility of reconciling a workplace policy with the religious practice of an employee. There is nothing as such in our labour legislation or other laws of this country which enables a Tribunal to make an “inquiry” on the “sincerity” of the religious belief held by an employee and to decide whether a possible accommodation offered to her causes hardship to the employer. The more so as Counsel for the Respondent himself submitted that the issue of tikka has never been a religious issue and witnesses for the Respondent, especially the Spa Manager, was never questioned and neither addressed the Tribunal on a possible alternative to the wearing of the tikka. None of the witnesses mentioned any hardship caused to the operational requirements of the Respondent. They only mentioned the principle of “neutrality” which, it must be noted, was still a guiding principle at the time the tikka was not yet extended to the whole Hotel and was not deemed to be infringed. Moreover, in the case mentioned above, the Tribunal cannot lose sight of the fact that the summary judgment was given for the Respondent mainly on the facts at issue. Namely the fact that Cloutier at first asked to be allowed to cover her piercing and then she later averred that no accommodation was possible. This led the Court to question the sincerity of her belief. The Court also decided on the basis that a reasonable accommodation is not an accommodation that is preferred by the employee. In the absence of such requirements in our law, the Tribunal respectfully finds it difficult to follow the reasoning in that case, the more so as the Tribunal has not been addressed on such issues that may have led to such reasoning.

## **Conclusion**



In the present matter, considering the manner in which the Respondent implemented its decision to ban the tikka to all employees, the moreso a decision emanating from a misconceived interpretation of the law, we hold that on the principles of fairness and best practices of good employment relations (Section 97 Employment Relations Act 2008), the Respondent's action was irrational, unmeasured and undesirable.

We as a result award that Disputant should be allowed me to wear the "tikka" on her forefront during working hours.

It follows suit that all the warnings issued to the Disputant in relation to the wearing of the tikka are to be removed.

### **Tribunal's Appeal**

This is a humble appeal to the Respondent's empathy, compassion and understanding to focus on the future. Further proving or disproving on past allegations may not be of value now to a continuing relationship at work. The time is for reconciliation. *"Oh yes, the past can hurt. But you can either run from it, or learn from it."* (Rafiki, *The Lion King*). Good team work occurs when diverse abilities and insights join together to work towards a common goal. Holding onto the resentment of people you have to work with punishes you as much as it does them. One does not change relationships by trying to control people's behaviour but by also changing oneself in relation to them. This should result in a grateful feeling of humanness. Mrs Dalwhoor may not be the perfect employee, but Management admitted that she is currently a good employee. If Management is so keen in setting up an attire of neutrality it should deal with the problem, not the person. It should

try to see the situation from her point of view. In other words, give the other person part of ownership in the resolution and engage in a joint problem solving exercise. She finds it hard to detach herself from the 'tikka' be it from time to time and indeed she is emotional about it. *"We cannot leave our emotions at home because they are part of our unique status as human beings and, therefore, situations in which we cannot express our feelings are stressful."* (G. Dumbrara, Assist. Prof, Ph.D ,University of Petrosani, Romania. *Workplace Relations and Emotional Intelligence - Annals of the University of Petrosani, Economics, 11(3), 2011, 85-92).*

Every country's system of employment - industrial relations is in certain ways unique because it is shaped by a distinctive national history, culture, economy and set of political and social institutions. In Mauritius, we all come from somewhere with a tradition and culture that we cherish. To ban any of it, be it at work leads to a sensitive area that needs to be addressed with care. At no time in this Award have we suggested that Management intentionally meant to cause harm to any of its employees. We believe Management will go out of its way to provide the best working environment. However, in striving obsessively to maintain a five star hotel standard, it should not turn the resort into a military zone. Rally the people around and get their consensus when it comes to sensitive issues especially in an enterprise where there is no union representation. Management should be proactive and lead its workers instead of driving them. The reason some people in our lives remain one dimensional is because that is as far as we go with them. A majority decision coming from workers should ease Management's task in implementing changes, especially those considered to be sensitive. Labour disputes are to be considered as a process to reach agreement.

Management concedes that employees are their biggest assets. As such, when Management considers bringing change at work, it is not too much if it makes the first step. We must never lose sight of the fact that an employer's inability to effectively deal with conflict in the work place may result in a large loss of productivity and adversely impact on others who work there.

The Tribunal hopes that with the above remarks, it is assisting both parties to pick up the broken pieces and to continue working towards the objectives of the hotel in providing an excellent service expected of a five star establishment. Give hope a chance. Let a dose of tolerance be a source of inspiration. Let the '*tikka*' that has divided them, reunite them in a bond of respect and tradition for good and harmonious industrial relations.

The Tribunal wishes to thank the parties and their Counsel for conducting their respective cases in a dispassionate manner. We urge Counsel on each side to guide the parties towards reconciliation.

The Tribunal awards accordingly.

**SD Rashid Hossen**  
**President**

**SD Vijay Kumar Mohit**  
**Member**

**SD Rabin Gungoo**  
**Member**

**SD Teenah Jutton (Ms)**  
**Member**

**18<sup>th</sup> February 2019**