EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 126/18

Before

Indiren Sivaramen	**Vice-President**
Raffick Hossenbaccus	**Member**
Karen K. Veerapen	**Member**
Kevin C. Lukeeram	**Member**

In the matter of:-

Mr Muslim Abdul (Disputant)

And

Mahatma Gandhi Institute (Respondent)

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

"Whether I, Muslim Abdul, should be reinstated on the Driver Roster/ Duties at the Mahatma Gandhi Institute."

Disputant deponed before the Tribunal and he stated that since 2003 he is employed as Driver at the Respondent. Among his duties, he had to drive vehicles of Respondent and also perform "despatch". He stated that right from 2003 he was working overtime and received some Rs5000- to Rs10000- monthly as overtime. His basic salary was about Rs 21000-. Since June 2017, the Respondent decided to stop him from driving because of accidents he would have been involved in. He was informed verbally and

insisted for something in writing. He was then issued with a letter. He suggested that the accidents were minor ("ti") accidents and that the Respondent would have relied on accidents which occurred as from 2003. Since 2017, he was doing some despatch of letters and documents both within and outside the Respondent. He was provided with a driver for performing his despatch. He averred that he was not liable for the said accidents. He was not called before any disciplinary committee. He then referred to the letter dated 22 June 2017 issued by the Respondent and his reply by way of letter dated 30 June 2017.

Disputant also referred to a letter dated 19 September 2018 (after the matter had already been reported to the President of the CCM) emanating from Respondent whereby he was informed that either he accepted to abide by the present arrangements or he agreed to be retired in the interest of the Respondent. He stated that his overtime was of great help to him and that now he has to rely on the salary of his wife to meet both ends. He agreed with the accidents put to him but he did not agree that he was liable for the said accidents. He added that he reported the accidents at the relevant police stations. He averred that he was not prosecuted in relation to any of the accidents mentioned by the Respondent.

Disputant stated that he is stressed with the work being given to him and that he even fell sick. He stated that it would be nearly two years since he has been requested not to drive at the Respondent. He averred that he suffers financially from this measure taken by Respondent. On humanitarian grounds, he is praying that the Tribunal orders the Respondent to put him back on the Driver Roster.

In cross-examination, Disputant agreed that as per his scheme of duties, he has to carry out the despatch of correspondence and distribution of files. He agreed that he was involved in a series of accidents since he started driving vehicles of the Respondent. He stated that the normal procedure is for him to report all cases of accident to the police. He then suggested that if the police grants him "permission", then he can enter into a "constat à l'amiable". He agreed that he must inform his immediate supervisor about the accident and then report the accident to the Respondent. The Respondent will take his version of the accident in a book and then both the representative of Respondent and he will sign in the said book.

Disputant agreed that for the period 2011 to 2017 he met with at least twelve road accidents but he averred that these were minor accidents. He agreed that he received a "memo" dated 11 April 2005 from the Respondent following two accidents which occurred on 1 June 2004 and 17 December 2004 respectively. He also agreed that he received a letter dated 8 November 2012 where he was requested to be more careful following an accident which occurred on 21 August 2012. He agreed that he was not suspended from his duty nor dismissed. His basic salary has not decreased and his job

title on his pay slip is still “Driver”. He agreed that the Respondent has a discretion whether to give him overtime. When it was put to Disputant that he was removed from the roster on good ground because of the number of road accidents he was involved with and the expenses thus incurred by the Respondent, the latter simply stated that he believed that the expenses were covered by insurance and not met by Respondent. In re-examination, Disputant stated that he has to drive to earn overtime and if he does not drive he cannot earn overtime.

Mr Beerbul, the representative of Respondent, then deponed before the Tribunal and he solemnly affirmed as to the correctness of the contents of the Statement of Case of Respondent. He related the procedures to be followed after a road accident involving a driver of the Respondent. When referred to a particular accident on Annex B to the Statement of Case of Respondent, Mr Beerbul stated that the version under the fourth column bearing heading “Statement given by driver” emanates from Disputant and was written by an officer from the Finance Department in the report book where both the Disputant and the Finance Officer signed. He explained that the duties which are listed at numbers one to six in the scheme of duties (containing seven main duties) of Disputant are duties which would arise when a driver is in charge of or drives a vehicle.

Mr Beerbul stated that, on humanitarian ground, Disputant was maintained in his post even though he was requested not to drive vehicles.

In cross-examination, Mr Beerbul stated that reference to the temporary nature of Disputant’s removal from the Driver Roster in the Statement of Case of Respondent reflected the first decision of the Council in 2017. In 2018, there was another decision of the Council to the effect that either Disputant accepts the messengerial duties or he retires in the interest of the Respondent. Mr Beerbul stated that he does not believe that there was any disciplinary committee set up in the case of Disputant. He agreed that on Annex B to the Statement of Case of Respondent there were six accidents where Respondent could not decide if the version given by Disputant was true or not. He stated that it was an expert from insurance who decided on whether a driver was at fault or not.

Mr Beerbul stated that there was a meeting where Disputant was informed by one Mr Motah that he would be removed from the Driver Roster. He added that Disputant did not say that he was not agreeable. He stated that Disputant has, up to now, not made any request to the Respondent to put him anew on the Roster.

The Tribunal has examined all the evidence on record including the submissions of both counsel. Counsel for Respondent has taken a preliminary objection which reads as follows: *The Respondent moves that the dispute be set aside in as much as the dispute is misconceived as the Disputant has neither been suspended nor dismissed and is still*

performing his duties as per his Scheme of Service. The issue of reinstatement does not arise in the circumstances.

Counsel for Respondent took the objection in her submissions to the Tribunal after the case was closed. Counsel argued that the issue of reinstatement does not arise in the present matter and hence the Tribunal has no jurisdiction to deal with the said dispute.

"Labour dispute" is defined in section 2 of the Act as follows-

(a) means a dispute between a worker, or a recognised trade union of workers, or a joint negotiating panel, and an employer which relates wholly or mainly to wages, terms and conditions of employment, promotion, allocation of work between workers and groups of workers, reinstatement or suspension of employment of a worker;

(b) …;

(c) …

The term "reinstatement" was included in the definition of "labour dispute" right from the enactment of the Employment Relations Act in 2008. This was thus well before the Employment Rights Act was amended in 2013 to provide for the Employment Promotion and Protection Division (EPPD) and the possibility for the EPPD to order the reinstatement of a worker in an appropriate case. The Tribunal has had the occasion to consider the term "reinstatement" in several cases (**vide Mr Sheryad Hosany and Cargo Handling Corporation Ltd (ERT/RN 40/13), Mr Suraj Dewkurun and Gamma Materials Ltd (ERT/RN 70/13), Mrs Hemowtee Salaye Meetoo And Mauritius Broadcasting Corporation (ERT/RN 195/15)**) and the Tribunal concluded that the term "reinstatement" as used in the definition of "labour dispute" under the Act could not pertain to reinstatement following the termination of a contract of employment. In the case of **Meetoo H.S. v Employment Relations Tribunal 2018 SCJ 133**, the Supreme Court stated the following: "*The mere inclusion of reinstatement as an issue in relation to which there may be a "labour dispute" is insufficient, in the absence of a specific provision of the law, to confer on the Tribunal jurisdiction to deal with the issue of reinstatement following termination of employment in the teeth of sections 71 (a) of the Employment Relations Act 2008 and section 3 of the Industrial Court Act."* Otherwise, the matter would fall within the exclusive jurisdiction of the Industrial Court except in the case of the new EPPD provisions where the Tribunal has been specifically granted jurisdiction to order reinstatement of a worker in an appropriate case following a reduction of workforce.

The term "reinstated" as used in the terms of reference and in the light of the evidence adduced before us does not connote at all the idea that the Disputant wants to be "reinstated" following the termination of his contract of employment. As per the terms of

reference and evidence before us, Disputant wants to be reinstated on the "Driver Roster / Duties" (underlining is ours) at the Respondent.

The Tribunal is not prepared without enquiring into the dispute to simply set it aside on the ground that it does not have jurisdiction to deal with the said dispute.

The Tribunal has no doubt jurisdiction to hear a dispute which relates wholly or mainly to wages and/or terms and conditions of employment. A dispute in relation to a driver who has been stopped from performing driving duties or removed from the Driver Roster certainly relates mainly to terms and conditions of employment of the said driver. Whether ultimately the Tribunal has the power to grant the remedy being sought is a different matter and will be dealt with later.

The present dispute raises many issues. Disputant's Counsel argued that the case of the Disputant was not that there was a unilateral modification of his contract of employment but that there was a "unilateral decision" of the Respondent. However, Disputant in his letter of 30 June 2017 whilst informing the Respondent that he was not agreeable with the decision to remove him from the Driver Roster wrote the following: "…*and I consider same as a unilateral change in my conditions of employment*."

Submissions of Counsel for Respondent (save for the preliminary objection) were based on "modification unilatérale" of the contract of employment though Counsel tried to show that there was no unilateral modification of the contract of employment in the present case.

In this particular case, though the job title, scheme of duties (on paper) and the basic salary of Disputant remained the same, the Tribunal finds that the decision complained of would still relate to a "modification" of the terms and conditions of employment of Disputant. By removing driving duties from someone who is employed as Driver and who would thus, as per the unchallenged evidence on record, not be able to perform necessarily any of the other duties (listed on his scheme of duties as per Annex A to the Statement of Case of the Respondent) which are directly related to "being in charge of a vehicle", the Respondent has brought "une modification" to the contract of employment of Disputant. This was done unilaterally in the present case. Disputant's duty to perform messengerial duties "as and when required" (underlining is ours and which duty is only provided as duty number 7 in his scheme of duties) has now become basically his only duty at the Respondent. Also, the decision to prevent Disputant from performing driving duties and to remove him from the Driver Roster has had an impact on his pay packet. Disputant made it clear that he has been earning overtime every month since 2003 and that he can only obtain overtime when performing driving duties. Though this is not admitted by the Respondent, the latter has not adduced evidence to the contrary and has relied on the suggestion that overtime is not an acquired right and

is not guaranteed. There is no evidence before us that there is no more overtime being carried out at the Respondent or that drivers at the Respondent are no longer earning overtime. Respondent in fact confirms at paragraph 1(d) of the Statement of Case of Respondent that drivers of the Respondent are called upon to perform overtime duties on a roster basis and are remunerated at approved rates.

The Tribunal cannot close its eyes to the period of time over which Disputant claims he has been receiving overtime regularly so much so that he says that since June 2017 he has had to rely on the salary of his wife to make ends meet. The 'unilateral decision' as Counsel for Disputant would put it has had, undeniably, an impact on the "pay packet" of the Disputant.

This is not a case where "le régime des heures supplémentaires" (« les dispositions applicables aux heures supplémentaires ») has been changed. Here, Disputant has been simply stopped from driving and removed unilaterally from the Driver Roster because of the number of accidents he was involved with, whilst driving or being in charge of vehicles of the Respondent. It is important, at this stage, to bear in mind the importance given to "le critère alimentaire du salaire" under Mauritian case law (**vide Raman Ismael v UBS 1986 MR 182**).

In ***Droit du Travail, Vol 2, Rapports Individuels, Mementos Dalloz, 16eme edition,*** at page 138, we have the following :

4. Autres modifications

*On citera encore comme modification du contrat : celle qui porte sur la **qualification** du salarié, sur les **fonctions** et les attributions, l'accroissement permanent des tâches. Selon la Cour de cassation lorsque « l'économie fonctionnelle » du contrat de travail est affectée, il y a modification du contrat. Il en va ainsi lorsque le salarié était employé initialement à la vente de produits et qu'il a été affecté au service location de ces mêmes produits, car il ne s'agit pas d'un changement de simples tâches, mais bien d'un changement de **fonctions** qui s'accompagne en outre du retrait de certains avantages matériels.*

*NB : le contenu des fonctions peut également être modifié pour des **raisons disciplinaires**. Là encore, bien que la solution soit controversée, il y a une modification du contrat que le salarié peut refuser (voir supra, chap. 1, Les pouvoirs du chef d'entreprise). Selon un arrêt du 28 avril 2011, l'employeur qui notifie au salarié une sanction emportant modification du contrat de travail doit informer l'intéressé de sa faculté d'accepter ou de refuser cette mesure (RJS 2011, n° 610).*

We will refer to a recent judgment of the Supreme Court in the case of **CTL Retail Ltd v Commins M D C, 2019 SCJ 43** where the Court stated the following:

"*Though he made some findings in favour of the appellant, the learned Magistrate, however, did find that there was a demotion and cited the following from* ***Planiol et Ripert, Traité Pratique de Droit Civil Français T.xi para. 840****:*

« L'employeur peut décider une modification dans les conditions matérielles du travail, pourvu qu'il n'y ait pas une atteinte aux éléments essentiels du contrat, notamment en ce qui concerne la rémunération et la situation morale de l'employé. Dans le cas contraire, il y aurait une rétrogradation qui ne peut se justifier que pour un cause disciplinaire. »

The Learned Magistrate stated the following:

It necessarily follows that were the plaintiff to be transferred to Quatre Bornes and be responsible for only a Harris Wilson shop she would be no more in charge of the Floréal shop, that would mean she would be demoted from the promotion which she had previously obtained which would additionally entail a loss of income (the 0.5% commission of the monthly sales at Floréal Knitwear shop). There was therefore a unilateral change in the contract but not a mere exercise of the employer's right to make « simple changement des conditions de travail ». Such modification of the plaintiff's contract of employment (modification du contrat de travail) required the plaintiff's express consent.

The above reasoning cannot be faulted. The learned Magistrate had sufficient basis to come to the conclusion that the respondent was in charge of two shops and entitled to commission on the sales of both shops. This, he found, was an added responsibility which she bore and was remunerated for that added responsibility by the commission for some years. The transfer to Quatre Bornes would entail a loss of this income and the responsibility for only one shop instead of two.

This is illustrated in the decision of Cour de Cassation 21 fév 2007 no 04-47.682

« … … la cour d'appel a constaté que la prime de responsabilité était versée depuis plusieurs années à M. X … qui exerçait des fonctions et des responsabilités supplémentaires résultant du remplacement de l'attaché de direction ; qu'elle en a déduit à bon droit que <u>la suppression de ce remplacement et des revenus supplémentaires qui n'étaient pas occasionnels, constituait une modification unilatérale du contrat de travail</u>, que le moyen n'est pas fondé ; » (underlining is ours)

We may also refer to a judgment of the Cour de Cassation where it was held that:

En revanche, le changement d'affectation d'un mécanicien d'entretien de l'équipe de nuit à l'équipe de jour, à la suite d'agissements fautifs, entraînant une diminution de

*certains éléments de sa rémunération, a été jugé illicite et assimilé à une sanction pécuniaire prohibée par la loi (**Cour de cassation du 11 mars 1997**).*

In the case **of A.J. Maurel Construction Ltee v Froget H R N 2008 SCJ 164**, the Supreme Court whilst referring to comments from **Guy Lautier** in his work **Maxima** in Chapter "Démission, Départ, Licenciement, Retraite, Sanctions", stated the following:

« *La modification essentielle est celle qui transforme un élément du contrat qui présentait de l'importance pour un salarié lors de la conclusion du contrat de travail ou qui aggrave de façon notable ses conditions de travail (modification de l'horaire, du lieu de travail … » Démission, Départ, Licenciement, Retraite, Sanctions.*
A decision which impacts on the pay packet of an employee is a serious matter. That is why, any modification concerning an employee's remuneration is subjected to strict judicial scrutiny. Remuneration includes salary and the benefits that may be said to go with the salary or "the salarium" which includes the "accessories:" see Jean Emmanuel Ray Droit du Travail, Droit Vivant p. 173, para 123. What is included or excluded in the salarium may not be so obvious. For example, the end of year bonus was not at one time considered to be part of the salarium in Mauritian Labour law. But it is unlikely that the present position would be the same today as it was in 1982: see The New Mauritius Hotels Group v. Benoit & New Mauritius Hotels vs Others [1982 MR 109]. Indeed, as per section 2 of the Labour Act, "remuneration means all emoluments earned by a worker under an agreement."
Be that as it may, the concept of salarium today includes many "accessories" and courts interpret it in favour of the worker against the employer in the absence of clear provision in the contract:
« La modification concernant la rémunération au sujet de laquelle la jurisprudence se montre très stricte, qu'il s'agisse du salaire (18 avr. 1980 Bull. civ. V. 249 : réduction du coefficient des salaires dans le cadre de réorganisation d'une entreprise) ou de ses accessoires (soc, 20 févr, 1975 préc. (perte de l'avantage de l'assurance du véhicule et de son entretien par l'employeur) ; 30 nov. 1977, D. 1978. I.R. 63. civ v. 527 (suppression de primes de chantier) ; 13 oct. 1977, Bull. civ. V.426 (diminution de l'intéressement d'un cadre pendant une période de maladie contrairement à la convention collective).
It cannot be said, therefore, that the terms which the appellant altered were not essential to the contract in question.

In the case of **Saint Aubin Limitee (Appellant) *v* Alain Jean Francois Doger de Speville (Respondent) [2011] UKPC 42,** the Law Lords referred to the case of **Cayeux Ltd v De Maroussem 1974 MR 166** and stated the following:

In Cayeux Ltd v de Maroussem 1974 MR 166, the Supreme Court applied the approach indicated in Harel Frères Ltd v Veerasamy [1968 MR 218] in a context where the employer company had lost two of its three contracts with major petrol companies for servicing, maintenance and repair work. As a result of this loss, the company had no longer any work or need for one of the two assistants who had previously worked on such contracts. The claimant, one of such assistants, was retained on full pay, but was

expected to sit in an empty office without work and was, for good measure, rebuked for absenting himself from work when he went to consult his legal adviser. With evident justification, he treated this change in his conditions as a constructive dismissal. However, the Supreme Court concluded that termination as such was justified. The employer's operational requirements had changed, and it had no more work for the employee. It had a valid reason to put an end to the contract of employment on notice and payment of severance allowance at the ordinary rate (p.170). The employee was entitled (in effect) to no more than he would have received had the employer taken that course.

In **Dr D. Fok Kan, Introduction au droit du travail mauricien (above)**, we have the following at pages 243 to 245:

B – Le Rétrogradation et Autres Sanctions Ayant un Effet sur le Contrat de Travail

Si la rétrogradation peut faire suite à l'exercice du pouvoir de direction, elle peut également constituer une sanction disciplinaire. Dans le premier cas on fera application des règles en matière de modification des conditions du contrat de travail. En règle générale celles-ci exigeront le consentement de l'employé. Qu'en est-il dans le deuxième cas ?

La jurisprudence mauricienne refuse de faire cette distinction et applique les règles en matière de modification des conditions du contrat de travail, ignorant ainsi l'origine disciplinaire de la rétrogradation. Tel a été le cas dans l'arrêt Vacoas Transport Co. Ltd v Pointu. On peut penser que ce sera également le cas pour toute autre sanction ayant des effets sur le contrat de travail, telle, par exemple, un transfert vers un autre établissement de l'entreprise. Dès lors que la sanction touche au 'socle' du contrat ce sont les règles en matière de l'exercice du pouvoir de direction qui trouvent leur application.

On ne peut toutefois ignorer le fait que les auteurs cités par la jurisprudence mauricienne elle-même font une telle distinction. Ainsi selon Planiol et Ripert, cité par Vacoas Transport Co. Ltd. v. Pointu, « dans le cas contraire il y aurait une rétrogradation qui ne peut se justifier que pour une cause disciplinaire ». Il semblerait ainsi que le pouvoir disciplinaire permet une rétrogradation alors même qu'elle constitue une modification des conditions du contrat de travail, la rétrogradation s'imposant à l'employé. Le refus de cette sanction s'analyse en un acte d'indiscipline constituant une faute grave justifiant le licenciement immédiat de l'employé. Telle a été la jurisprudence française pendant longtemps. Cette solution était justifiée par le fait qu'une sanction disciplinaire pouvait difficilement être sujette au consentement de l'employé, ce qui serait le cas si les règles en matière de modification devaient trouver leur application. Elle avait toutefois l'inconvénient de permettre le licenciement de l'employé alors même que la faute originale point grave.

Dans un arrêt en date du 21 février 1990, arrêt dit Saint-Michel, la Cour de Cassation décidait toutefois « qu'en statuant ainsi, alors qu'il résultait de ses constatations que le

déclassement que l'employeur avait imposé au salarié apportait une modification substantielle au contrat de travail que celui-ci n'avait pas acceptée, ce dont il résultait qu'il appartenait à l'employeur de prendre l'initiative de la rupture en mettant en œuvre la procédure de licenciement, la cour d'appel a violé les textes susvisés ». Il est à remarquer que la cour d'appel avait estimé que le déclassement était justifié par une faute grave de l'employé. La Cour de Cassation aligne ainsi le régime de la rétrogradation disciplinaire sur celui de la modification d'une condition essentielle du contrat de travail. La rétrogradation ne constitue point une sanction disciplinaire en tant que telle; elle ne le devient qu'en cas d'acceptation. Suivant cette approche la sanction d'une faute par une rétrogradation intervient ainsi en deux temps. En premier lieu l'employeur sanctionne la faute par la rétrogradation. En cas d'acceptation par l'employé, le problème s'arrête là. En cas de refus, l'employeur peut soit ne pas sanctionner la faute ou alors la sanctionner autrement; avertissement, mise à pied ou même licenciement. Cette approche a été confirmée par ce qui a été appelée la jurisprudence Hôtel le Berry.

In a judgment of the **Cour de Cassation of 16 December 2005** (voir **Dr D. Fok Kan, Introduction au droit du travail mauricien, 1/Les relations individuelles de travail** à la page 246), we can read the following :

Mais attendu que la cour d'appel a retenu qu'il résultait de la lettre de licenciement que, sous le couvert de la mise en oeuvre de la clause de mobilité prévue au contrat de travail de la salariée, la décision de l'employeur, qui alléguait l'échec de l'intéressée dans les fonctions auxquelles elle avait été promue quelques mois auparavant, devait s'analyser comme une rétrogradation : qu'elle a pu décider, dès lors que la salariée était en droit de refuser une telle proposition ; que le moyen n'est pas fondé ;

In France, the notion of « sanction disciplinaire » is defined in the Code du Travail unlike the case here in Mauritius. Thus, in ***Droit du travail, Droit Privé par Jean Pélissier, Gilles Auzero et Emmanuel Dockès, 2012, 26e édition***, at page 747, note 725, we can read the following :

Notion de sanction disciplinaire

725 Enjeu *◇ L'enjeu de la qualification de « sanction disciplinaire » n'est nullement de dire que telle ou telle mesure est valide. Il s'agit au contraire de dire que telle mesure s'annonce suspecte, dangereuse et qu'elle doit être passée au crible du droit disciplinaire avant de pouvoir être considérée comme valide. Ceci explique la définition légale de la notion de « sanction disciplinaire ». Aux termes de l'article L. 1331-1 du Code du travail : « Constitue une sanction toute mesure, autre que les observations verbales, prise par l'employeur à la suite d'un agissement du salarié considéré par l'employeur comme fautif, que cette mesure soit de nature à affecter immédiatement ou non la présence du salarié dans l'entreprise, sa fonction, sa carrière ou sa rémunération ». Si telle ou telle mesure de l'employeur entre dans cette définition, elle*

est soumise au droit disciplinaire, lequel exige une procédure, des règles de prescription, de proportionnalité, etc. La définition légale de la sanction disciplinaire est donc cruciale. Il est nécessaire de la commenter mot à mot pour bien la comprendre.

One element however is interesting (though we bear in mind that there is no such definition under our law) and it relates to « …*considéré par l'employeur comme fautif*.." and we can read at note 728 (see above) the following:

728 «… considéré par lui comme fautif… » *Il faut se rappeler que l'enjeu de la qualification de sanction disciplinaire est l'application des protections du droit disciplinaire. Pour que ces protections s'appliquent, il faut qualifier la mesure de l'employeur de « sanction disciplinaire ». On comprend alors que la qualification de « sanction » ne demande pas que la mesure ait été, en vérité, fondée par une faute. Une sanction disciplinaire doit, pour être licite, être fondée par une faute. Mais la protection est d'autant plus nécessaire lorsqu'il n'y pas de faute. Ainsi, par exemple, un salarié qui adhère à un syndicat ne commet aucune faute. Il se peut cependant que l'employeur n'apprécie pas ce comportement, qu'il le perçoive négativement. Il s'agira alors d'un « comportement considéré (par l'employeur) comme fautif ». Si l'employeur prend une mesure « à la suite » de ce comportement, comme une mutation par exemple, cette mesure sera considérée comme une sanction disciplinaire, ce qui permettra l'application des protections du droit disciplinaire. En l'espèce, ces protections seront particulièrement utiles. Le droit disciplinaire permettra de dire la sanction « illégale » et même « discriminatoire ». C'est justement dans ce type d'hypothèses, lorsqu'il n'y a pas de faute, que la protection du droit disciplinaire est la plus importante et que la qualification de « sanction disciplinaire» est la plus nécessaire.*

La qualification de sanction disciplinaire est donc indépendante de l'existence, en réalité, d'une faute du salarié. Seule importe l'impression de l'employeur. Par exemple, une retenue sur salaire est une sanction disciplinaire, si elle a lieu à la suite d'un travail que l'employeur considère comme non fait ou mal fait.

Réciproquement, le refus par l'employeur d'octroyer une récompense, par exemple le refus d'accorder un avancement au choix, échappe à la qualification de sanction disciplinaire. Ce refus est bien la suite d'une évaluation du salarié, mais elle ne suit pas une évaluation négative, un comportement considéré comme fautif. Le refus de récompense n'est que la conséquence d'un jugement neutre ou insuffisamment positif. Il n'est donc pas une sanction disciplinaire.

In Annex B (List of accidents) to the Statement of Case of Respondent, we keep in mind the column bearing the heading "Whether Driver at Fault Yes/No".

In the case of **Joseph J v Rey & Lenferna Ltd 2008 SCJ 342**, the Supreme Court stated:

The respondent's case was that there was no modification of the appellant's essential terms and conditions of employment since the latter had maintained his status of manager as well as his remuneration and that he had himself chosen to put an end to his contract of employment after having initially agreed to co-manage the department.

(…) After analysing the evidence placed before her in the light of the principles laid down in ***Vacoas Transport Co Ltd v Pointu [1970 MR 35], Periag v International Beverages Ltd [1983 MR 108]*** *and* ***The Constance & La Gaité S.E. Co. Ltd. V S. Bhungshee [2000 SCJ 67]****, the learned Magistrate found that by appointing Marc Lagane as administrative manager and «porte parole» of the diesel department, and reducing the appellant's responsibilities to that of a technical manager only, the respondent had made a 'substantial' modification to the appellant's terms and condition of employment but concluded that there had been no constructive dismissal since the modification had not been a unilateral one.*

(…) In a case of constructive dismissal, the employee's response to the employer's conduct is an important factor. The employee must be careful that his response does not imply a willingness to accept the new conditions. He must not stay on in circumstances which imply that he does not regard his employer's conduct as entitling him to terminate his contract of employment. Our case law has laid down that the test for constructive dismissal is a contractual test. A constructive dismissal by an employer occurs where an employee is entitled to put an end to his contract of employment by reason of his employer's conduct. Although the employee terminates his employment, it is the employer's conduct which constitutes the breach of contract. It is therefore imperative that the employee clearly indicates, by word or conduct, that he is treating the contract as having been terminated by his employer and if he fails to do so, he will not be entitled to claim that he has been constructively dismissed. This principle was clearly explained in ***Periag v International Beverages Ltd (supra)*** *in the following words:*

> *"First, since under the general principles of our law of contract a worker is entitled to treat his employment agreement as at an end in circumstances where his employer commits a breach of such a kind as to entitle the worker to do so, the worker must elect whether to treat his employment agreement as at an end and terminate it or to overlook the breach and stay in his employment under changed terms. He may protest or take some little time or do both before making his election and taking a final decision. He must, however, make his election. Otherwise his employment links will not be severed and he will be regarded as being in 'continuous*

employment'. In this respect, both English and Mauritian case law have reached the same solutions".

The following observations of ***Lord Denning*** *in* ***Western Escavations (Ece) Ltd. v Sharp [1978 1 ALL E.R. 713]****, referred to in* ***Periag (supra)****, are also pertinent:*

> *"The employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose the right to treat himself as discharged".*

The Tribunal will also quote extensively from the case of **Adamas Limited v Mrs. Yong Ting Ping How Fok Cheung [2011] UKPC 32, w**here the Judicial Committee of the Privy Council stated the following:

…

20. In the case of The Constance & La Gaiété a watchman was in August 1993 transferred to his employers' Belle Mare section, where he would be expected to do night shifts as well as the day shifts which he had until then had. He undertook night shifts under protest for some six months, but then claimed to have been constructively dismissed. The Supreme Court held, first, that he had had - no "acquired right …. to work only on day shift" and had failed to establish that his transfer to the new section "constituted a substantial modification of his term of service" but, secondly, that, even if one were to assume that the change was improper, he must be deemed to have accepted the modification, and his decision to quit in February 1994 was a resignation, not a constructive dismissal. The Supreme Court cited in this connection all but the last sentence of the passage from Periag quoted above.

21. In the third case of Joseph, the employee had been manager of a department with responsibility for sales, marketing and administration as well as technical aspects, but, after a takeover of another company, a co-manager was appointed in respect of the former aspects, while his activity was limited to the technical. It was found on the facts that he had accepted the change without protest and had worked for a month, before deciding to leave and found his own company. His claim for constructive dismissal was dismissed. The Supreme Court said that:

> *"In a case of constructive dismissal, the employee's response to the employer's conduct is an important factor. The employee must be careful that his response does not imply a willingness to accept the new conditions. He must not stay on in circumstances which imply that he does not regard his employer's conduct as entitling him to terminate his contract of employment."*

The Court went on to refer to the passage in Periag and Lord Denning's dictum in Western Excavating, and to say that "In the present case, the appellant's lack of response to the new terms clearly showed that he had initially accepted the new conditions and remained in employment before changing his mind must later."

22. In each of these three cases, there was no accepted constructive dismissal, because the employee had, at least by conduct, accepted the new post or terms which the employers had assigned and did not treat the change made as repudiatory or (therefore) as a constructive dismissal.

23. In none of these cases was the situation considered of a change of the nature or terms of employment, which although improper was not sufficiently serious to be repudiatory or therefore capable of constituting a constructive dismissal. In none of them was the situation considered of an announced change of terms which, although repudiatory, did not call for any immediate response or action by the employee, who could and did continue to perform his or her original job as if no change had been requested.

24. In the present case, the Board considers that two questions arise which are not, therefore, covered by these previous decisions. First, were the appellants in Mr Samba's letters of 13 and 27 December 2001 insisting on a change which was repudiatory, in the sense that Mrs Cheung could, if she had wished, have brought her employment to an end on the ground that she had been constructively dismissed? Secondly, assuming that the change was repudiatory, was Mrs Cheung obliged to treat it as such, bearing in mind that she could perform her contractual duties (as she correctly saw them) perfectly adequately? Could she not simply await and then refuse any instructions to deliver jewellery that might be given, leaving it to the appellants, if they wanted, actually to dismiss her and thereby expose themselves to her present claim for unjustified dismissal?

25. On one view, the words "stay in his employment under changed terms" used in Periag and later cases might be read as suggesting that any employee, who continues in employment after any breach by his or her employer consisting of a requirement to do work outside the scope of the original employment contract, thereby accepts the new conditions. But this would not represent a rational legal position. If the change demanded was, although outside the scope of the original contract, so minor as not to be repudiatory, the employee would have no right to treat him or herself as constructively dismissed. It could not be right in such circumstances to treat an employee as having waived any claim for damages for the breach. The Board understood Mr Ahnee to accept that whether conduct is sufficiently serious to justify termination of a contract always depends on an analysis of the particular circumstances.

It may be open to question whether the change proposed in this case was repudiatory, when Mrs Cheung could simply refuse to undertake deliveries if and when asked. But, even if one assumes that most if not all unilateral changes of job or terms by an employer including the present would be repudiatory if outside the scope of the original contract, the Board sees no reason why an employee, faced with an employer's demand for what the employee regards as unjustified changes, should then be obliged to treat the contract of employment as terminated on pain of being held, otherwise, to have accepted such changes. Where, as here, the original contractual job continues to exist and to be capable of performance by the employee (underlining is ours)*, the employee can continue to perform; it is the employer who in such circumstances has to decide what stance to take.*

26. The views expressed by the Board in the previous paragraph are reinforced by a consideration of the treatment of the subject in Introduction au Droit du Travail mauricien (1995) by M D Fokkan (a lecturer at the University of Mauritius). Mr Ahnee helpfully and properly directed the Board's attention to this work. In it M. Fokkan discusses in some detail at pp 145-148 the legal position arising where an employer introduces a change falling outside the original contract ("une modification substantielle" as opposed to the mere "modification accessoire" occurring when an employer introduces revised arrangements falling within the scope of the original contract). Starting with the proposition that a modification substantielle "requiert impérativement le consentement de l'employé", Mr Fokkan then cites the passage quoted above from Periag, which he discusses as follows:

> *" L'employé peut soit refuser ou accepter la modification. En cas d'acceptation il y a novation de l'obligation ayant fait l'objet de la modification. Aucune des deux parties ne peut y revenir. Une novation requiert en principe une manifestation de volonté valable et libre. …….*
>
> *En cas de refus explicite, l'employeur peut soit faire marche arrière et maintenir les conditions convenues à l'origine dans le contrat ou alors insister sur celle-ci qui mènera probablement vers un licenciement de l'employé, l'employeur ne pouvant pas imposer la modification à celui-ci. Le refus peut être un refus exprès ou alors s'exprimer par le comportement de l'employé. Plusieurs hypothèses sont ici possibles. La première consiste pour l'employé à prendre acte de la rupture et à s'adresser à la cour pour faire reconnaître le licenciement, qu'on qualifie alors de "constructive dismissal". La seconde consiste pour l'employé à cesser de travailler sans toutefois saisir le tribunal. Il convient ici à ce que l'employé fasse bien connaître son intention afin d'éviter qu'elle ne soit interprétée come un* (sic) *démission. Il faut toutefois faire ressortir qu'une*

"démission ne se présume pas et ne peut résulter que de la volonté claire et non équivoque du salarié de mettre fin au contrat de travail." (…)

Il existe toutefois une dernière situation, celle où l'employé ne procède pas à un "election" mais continue malgré tout à travailler. Cette situation ne peut se présenter en vérité que dans les cas où la modification ne requiert pas la collaboration de l'employé, tel par exemple les modifications dans la rénumération (sic)*. Y a-t-il un consentement tacite à la modification empêchant éventuellement l'employé d'invoquer la rupture? "He may protest or take some little time before making his election...He must, however, make his election." L'arrêt Periag peut être interprété de deux façons. Premièrement, puisque l'initiative de la rupture revient à l'employé, si celui-ci continue à travailler, et cela même après avoir protesté, il pourra éventuellement (après le "little time") être considéré comme ayant accepté la modification: "First since under the general principles of our law of contract a worker is entitled to treat his employment agreement as at an end and terminate it or to overlook the breach and stay in his employment under changed term." Cette approche est conforme à l'ancienne jurisprudence française pour laquelle "il appartient au salarié de prendre acte de la rupture, sans pouvoir exiger le maintien des conditions antérieures" (Soc., 21 janvier 1987, Bull, V, no.33) et que, s'il continue à travailler, il "n'a pas usé de son-droit de faire constater la rupture aux torts de l'employeur" et doit donc être présumé avoir accepté les nouvelles conditions de travail (Soc. 9, 10 et 23 avril 1986, Dr.Soc., 1986.869). Rivero & Savatier désapprouvent cette jurisprudence car "cela obligeait le salarié refusant la modification de son contrat à prendre l'initiative de la rupture" alors que ça aurait dû être à l'employeur de tirer les consequences de son acte. Une autre lecture de l'arrêt Periag est toutefois possible. La question qui était posé à la Cour était si un employé pouvait avoir droit à l'indemnité de licenciement s'il n'y avait aucune rupture du contrat, celui-ci continuant à travailler dans l'entrprise* (sic)*. A quoi la Cour répond par le négative* (sic). *L'éligibilité à 'indemnité de licenciement n'intervient qu'en cas de rupture du contrat: "the payment of severance allowance presupposes the ending of the employment relationship and cannot arise unless the worker is no longer employed by his employer." Toute inteprétation de l'arrêt Periag devrait ainsi être limitée à la réponse que l'arrêt donne à cette question. Le simple fait de continuer à travailler dans l'entreprise n'implique pas ainsi nécessairement une acceptation de la modification. C'est en effet la solution maintenant retenue en France par la Cour de cassation, 8 octobre 1987 (Raquin et Trappiez c. Société Jacques Marchand). Il revient en effet à l'employeur de prendre acte du refus de l'employé et de licencier celui-ci. La simple poursuite du travail en elle-même,*

alors que l'employé aurait initialement refusé la modification, ne saurait être interprétée comme une acceptation tacite. De par son état de subordination, l'employé ne fait ici que subir la modification sans pour autant l'accepter. Dans l'espèce Raquin, l'employé a pu ainsi demander un rappel de son salaire sur environ une dizaine d'années."

27. M Fokkan thus starts with a clear statement that an employee can refuse or accept a modification of the contract of employment. M. Fokkan goes on to say that "En cas d'acceptation il y a novation de l'obligation ayant fait l'objet de la modification. That indicates (since the parties have not changed) a variation of the particular obligation the subject of the change. In that event "Aucune des deux parties ne peut y revenir". But, as M. Fokkan rightly goes on, "Une novation require (sic) *en principe une manifestation de volonté valable et libre" – a variation requires in principle a manifestation of valid and freely expressed will. In the Board's view this is the underlying principle. As to the decision in Periag, M Fokkan takes the view which the Board has indicated in paragraph 25 above that it prefers; he notes, as the Board has in paragraphs 17-19 above, that Periag was only concerned with the question whether an employee who decides to remain in employment after a constructive dismissal can claim severance pay, and he states that "the simple fact of continuing in employment in the enterprise does not necessarily imply an acceptance of the modification". As this recognises, a manifestation of will <u>may in some circumstances be implied from conduct, but the mere fact of continuing to perform according to the original contract</u>* (underlining is ours) *does not manifest any acceptance of a proposed modification.*

28. In support of this view, M Fokkan is able to cite both French academic opinion (Profs Rivero and Savatier) and the modern French authority of Raquin et Trappiez c Société Jacques Marchand (8 October 1987, No de pourvoi: 84-41902 84- 41903). In this latter case, an employer sought unilaterally to vary employees' remuneration and the Cour de cassation said:

"Attendu que, pour débouter MM. Raquin et Trappiez de leur demande en paiement de rappels de salaires et de sommes représentant l'incidence qui devait en résulter sur le montant des indemnités de rupture et de la prime annuelle, la cour d'appel énonce que s'il n'appartient pas au salarié, qui refuse de donner son accord à la réduction de salaire, d'imposer à l'employeur le maintien des conditions antérieures, en revanche il lui incombe de tirer les conséquences de ce désaccord en prenant, s'il l'estime utile, l'initiative de la rupture du lien contractuel ; Attendu qu'en statuant par ces motifs, alors que l'acceptation par MM. Raquin et Trappiez de la modification substantielle qu'ils avaient refusée, du contrat de travail ne pouvait résulter de la poursuite par eux

du travail, et alors que c'était à l'employeur de prendre la responsabilité d'une rupture, la cour d'appel a violé le text (sic) *susvisé"*

29. Earlier Cour de cassation authority might be read as taking a more rigid line. M. Fokkan cites a decision of 21 January 1987 (No de pourvoi 84-40956) for its general statement that, in a case where an employer makes a modification of a substantial element of the contract, it is up to the employee to treat the contract as at an end, without being able to insist on the maintenance of the previous terms. Both the decision on 8 October 1987 in Raquin et Trappiez and the earlier decision of 21 January 1987 concerned very briefly stated facts, very far removed from the present : in Raquin et Trappiez, it appears, a change of remuneration, resulting in a loss of income which the employees protested, although continuing to work for some ten years; and, in the earlier decision, it appears, a restructuring of remuneration, which the employee was again said to have protested, although continuing to work for some six years.

30. It is unnecessary to consider the facts or outcome in either Cour de cassation decision, or how any comparable case might be resolved in Mauritius. The facts of the present case lie within a much smaller compass and time-scale. What matters for present purposes is the general principle under French law, and in this respect the Board prefers the principle stated in the later case, Raquin et Trappiez. More recent authority, again in the area of reduction of salary, also speaks in terms consistent with Raquin et Trappiez: see Société Roneo (31 October 2000, No de pourvoi 98-44988 98-45118), where the Cour de Cassation stated that modification of a contract of employment by an employer, for whatever reason that might be, requires the consent of the employee.

Now, in the present case even though Disputant protested against the decision taken to remove him from the Driver Roster, he continued to work at the Respondent carrying out despatches of documents. Though reference is made in his Statement of Case to a previous dispute he would have reported on the same issues to the CCM, Disputant admitted in his Statement of Case that he agreed to withdraw the said dispute which was then before the Tribunal (referred again by the CCM) allegedly "since he was informed by his Senior Officer that the decision to remove him from the Driver's Roster was a temporary one and that necessary action was being taken to reinstate him on the Driver's roster and to assign him driving duties." The latter part of the above averment is not admitted by the Respondent. Some nine months after Disputant was stopped from driving and removed from the Driver Roster, the latter thus willingly continued to work <u>even though execution of his work as per his original contract was not possible</u> (underlining is ours). He was not allowed to drive as a driver and thus did not drive. He could not and did not perform overtime whereas he has averred that "he used to rely on

the additional sum derived from working overtime to cater for his modest family". Disputant certainly did not act in a manner which showed that he considered the change was repudiatory.

Whilst the Tribunal is of the opinion, based on the evidence before it, that Respondent needed to have the consent of the Disputant to proceed as he did, that is, to remove the latter from the Driver Roster and to prevent him from driving vehicles of the Respondent, the Tribunal is not satisfied that Disputant in turn reacted as he should have, the more so when his pay packet was being affected and that he was allegedly falling sick because of his work. This is not a case where he could proceed doing his job as before, as if no change had been brought to his contract of employment and thus leaving it to the Respondent to take 'steps' when the Respondent contented himself with the new arrangements.

This is exactly why the present matter ended up being reported to the President of the CCM on no less than two occasions and the parties appearing before this Tribunal. For ease of reference, we will reproduce the terms of reference which read as follows:

"Whether I, Muslim Abdul, should be reinstated on the Driver Roster/ Duties at the Mahatma Gandhi Institute."

This is a rather peculiar request being made to the Tribunal so much so that Respondent even raised the above-mentioned preliminary objection. The Tribunal will thus come back to the remedy which the Disputant is trying to obtain, so to say, through the backdoor by seeking to force his employer to reinstate him on the Driver Roster despite the decision taken by the Respondent in view of the numerous accidents Disputant has been involved with. The award, being sought, would be akin to an order compelling the Respondent to allow Disputant to drive vehicles of the Respondent and to put him back on the Driver Roster. This remedy cannot be granted in the light of all the evidence on record just like the Respondent cannot seek an order compelling Disputant to provide his services to the Respondent if Disputant is unwilling to do so. Thus, even making abstraction of possible other issues such as safety of passengers and property, the Tribunal finds that it has no power, in the light of the evidence adduced before it, to award that the employer is to reinstate the Disputant on the Driver Roster or to award that the Respondent should allow the Disputant to drive vehicles of Respondent.

The remedy of the disputant, if any, lies elsewhere. For all the reasons given above, the dispute is set aside.

SD Indiren Sivaramen

Vice-President

SD Raffick Hossenbaccus

Member

SD Karen K. Veerapen

Member

SD Kevin C. Lukeeram

Member

14 March 2019