

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 34/19

Before

Indiren Sivaramen	Vice-President
Marie Désirée Lily Lactive	Member
Karen K. Veerapen	Member
Ghianeswar Gokhool	Member

In the matter of:-

Mr Hendry Stephan Martial (Disputant)

And

Cargo Handling Corporation Ltd (Respondent)

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

“Whether, in its redeployment exercise, the Cargo Handling Corporation Ltd should provide Hendry Stephan Martial an alternative job with monthly revenue more or less equivalent to his revenue at his initial post or otherwise.”

“Whether the Cargo Handling Corporation Ltd should grant Hendry Stephan Martial his annual increment for the year 2019 and should the Company reinstate him on the salary point of the salary scale of RTG Operator or otherwise.”

Disputant deposed before the Tribunal and he stated that he joined the Respondent on 16 September 2005 and was confirmed in September 2006 as RTG Operator. He worked as RTG Operator until 3 October 2010 when he met with an accident. He spent six months for his convalescence and in April 2011 he resumed duties with a medical certificate to carry out "light duty". He was posted as Logistics Officer. Afterwards, he underwent another surgery on his left ankle and again absented himself from work until February 2012 to recover from his injury. When he resumed work, he was still posted in the Logistics department. Disputant suggested that he was put on "light duty" for a period of three months (only). After that, he suggested that he started working on three shifts in the Logistics department doing even night shift. On 11 September 2012, he wrote to the Respondent and requested to be transferred permanently to the Logistics department. He worked in the Logistics department until 2016. On 3 October 2016, he received a letter whereby he was transferred to the newly created Weigh-bridge unit. He worked there for some six months. He averred that he enjoyed the same work conditions except that there was a decrease of some 20% in his overtime.

Disputant was transferred anew to the Logistics Department on 7 April 2017 and then some time later he was informed in writing that he was transferred to the Store (Corporate section). He stated that he no longer benefitted from overtime, night shift allowance, productivity bonus and staggered meal time there and this represented a drop of about 40% from his salary. He stated that he then received a letter dated 31 May 2018 where the Respondent offered to redeploy him as Store Assistant as from 1 June 2018 and that if he did not accept the said offer, he would be retired on medical grounds. He stated that he had already contacted the Labour Office and though he is currently working in the Store department, he is doing so "under protest". On 14 August 2018, he was convened to attend a medical examination by a Medical Board. Following the medical examination, he was informed in writing that he was found unfit to work in his substantive grade as RTG Operator and the offer to redeploy him as Store Assistant was reiterated. He was also informed that if he did not accept, his employment would be terminated on medical grounds. Disputant averred that his 'light duty' ended in 2012 and that he was as from that period working on three shifts. He also mentioned for the first time in the case that he follows the Adventist faith and does not work from sunset on Friday to sunset on Saturday. He suggested that he was told that this affected work and that he would thus be posted in a department where he has to work from Monday to Friday. He stated that he worked in the store since 2017 even though he was formally given a letter in relation to the store only in May 2018. He is still working in the Store department and added that he was not granted his annual increment because he was allegedly still on 'light duty'. He produced copies of documents including copies of three of his pay-slips.

In cross-examination, Disputant agreed that he cannot act as RTG Operator on medical grounds but that he is still officially a RTG Operator as confirmed by his own pay slips. He conceded that the accident he met with did not occur on his worksite. He agreed that he was examined by a medical board on 14 November 2012 and that the board was of the opinion that he was not fit to climb ladders. However, he was found to be fit to engage in office duties. A copy of the said report was produced (Doc M). He accepted that the Respondent could have retired him on medical grounds but did not do so. He agreed that the Respondent has put him on 'light duty'. He however suggested that as from 2012, he started working on shift. He stated that he was then no longer on 'light duty' since no worker on 'light duty' would do the night shift. Disputant averred that he was on 'light duty' for only three months. He agreed that he was convened to appear before another medical board and was examined on 20 August 2018. A copy of the opinion of the board was produced (Doc O). He again conceded that the Respondent could have retired him on medical grounds but on humanitarian grounds did not do so. He also accepted that his basic salary has not decreased. He however stated that he is not earning overtime, staggered meal time, productivity bonus and night shift allowance. He accepted however that if he is posted in a department where there is no overtime or night shift, he would not benefit from overtime or night shift allowance.

Disputant agreed that the salary of a Store Assistant is less than that of RTG Operator and added that he is still being paid the salary of RTG Operator though actually working as Store Assistant. He agreed that he has refused to come to work on Saturdays because of what he stated in relation to his faith. Saturday is a normal working day however in the Operations department. He agreed that he could not choose where to work when his medical condition did not allow him to perform as RTG Operator. He accepted that since 3 October 2010 he is not performing as RTG Operator and that at the Respondent, one does not earn any increment during the period when one is not exercising one's substantive post. In re-examination, Disputant stated the only thing he could not do was to climb up ladders.

Mr Dahari, the Human Resource Manager, deponed and he stated that Disputant was employed as RTG Operator. However, the latter met with an accident and following a long sick leave, the latter was put on 'light duty'. He stated that there are cases at the Respondent where employees have been on 'light duty' for years. He added that someone is on 'light duty' when someone is not able to perform his substantive post. The Board of Respondent decided that it was high time to deal with the issue of 'light duty' in relation to employees who, as per medical advice, would not be able to work again in their substantive post. It was decided to offer these employees who were on 'light duty' the post that they were in fact performing. Since Disputant was then posted in the store, he was offered a post in the store. Mr Dahari suggested that there were

eleven employees concerned with this issue and that Disputant was the only one who did not accept the offer. He stated that ever since Disputant resumed work after his accident, he has always been considered as being on 'light duty'. Every worker was offered the same basic salary of his substantive post even though he was doing a job with a lower salary scale. He stated that Disputant worked for some time in the Logistics department but could not be offered a post there as he did not meet the qualifications required as per the scheme of service. Disputant then worked for some time in the Weigh-bridge unit but was transferred back to Logistics. There were less activities than initially planned in the Weigh-bridge unit which was finally closed down.

Following the second medical report dated 20 August 2018, it was found that Disputant was permanently unfit to work as RTG Operator and he was offered to be redeployed in the Finance Department as Store Assistant (as per Doc H). Mr Dahari maintained that the basic salary of the Disputant had not decreased and produced a document (Doc P) to show the change in his basic salary from 2010 to 2019 following salary reviews carried out. He explained that there is a long established practice in the port that where someone is on 'light duty' and is thus not performing in his substantive post, then the worker is not entitled to increments. In the case of Disputant, the increment will emanate from the salary scale of RTG Operator and being on 'light duty', Disputant is not performing as RTG Operator. However, if the Disputant had accepted the substantive post of Store Assistant, he would have obtained his yearly increments subject to good performance and a good record.

In cross-examination, Mr Dahari did not agree that when one is on 'light duty' one performs only day duty. He stated that 'light duty' varies depending on each particular case including the medical certificate filed. He agreed that the last medical certificate produced by Disputant was in 2012. He also accepted that Disputant was posted in the Logistics department and was doing the normal shift. He has worked in the Logistics department for several years and spent more time in 'Logistics' after he resumed work from injury as compared to the Weigh-bridge or the Store. Mr Dahari stated that at one point in time the issue was raised as to whether Disputant could be posted in 'Logistics'. The Logistics department has to work "full" from Friday to Saturday whereas Disputant was not able to work from Friday 6 pm to Saturday 6 pm. The fact that Disputant was always taking leaves from Friday 6 pm to Saturday 6 pm was one of the reasons for not posting him in the Logistics department. However, it was not the main reason since the Board decided to offer a post to each of the workers concerned based on where they were posted at the time of the decision. Mr Dahari maintained that management had consultations with the trade union having sole negotiating rights before the matter went to the board of directors. He mentioned the name of another officer who was in 'Operations' and who, just like Disputant, was posted in the corporate division.

The Tribunal has examined all the evidence on record including the submissions of both counsel. Pleadings were exchanged between the parties and the case was scheduled for hearing when it was 'in shape'. There was no indication at all or any hint in any of the statements of case filed or annexes thereto or even from the terms of reference of the disputes that an issue in relation to alleged discrimination or religious faith would be raised. The Tribunal has examined carefully the terms of reference of the disputes and the statements of case and finds that it will be proceeding *ultra petita* if it were to make any finding on an alleged discrimination.

As regards the first dispute, the Disputant has failed to provide any basis upon which he is relying to say that the offer for redeployment in an alternative job following the injury he sustained (not on his workplace) should relate to a job with monthly revenue more or less equivalent to his revenue at his initial post. There is no evidence of any provision of a collective agreement or of any established practice at the Respondent whereby offers for redeployment are made for jobs with "monthly revenue more or less equivalent" to the revenue of the initial post which an injured worker can no longer occupy. No reference has been made to any piece of legislation which may be relevant in the present case. In the absence of any of these, the Tribunal finds no basis on which to make an award as per the terms of reference under the first point in dispute. Also, the terms of reference are vague in the sense that "monthly revenue more or less equivalent to his revenue at his initial post" does not carry with it the precision and certainty which one would expect for remuneration which one expects for one's work. It is already admitted that there has been no reduction in the basic salary of the Disputant. Evidence has been adduced that even though Disputant was currently doing a job with a lower salary scale, his basic salary was maintained so as not to penalize him. Mr Dahari has averred that choosing where to redeploy a worker on 'light duty' is not an easy task the more so that workers may be suffering from different illnesses. He also referred to the worker having to meet required qualifications. We understand that a worker can only be redeployed in a post which is within his capabilities and where he will be able to perform.

The Respondent has the inherent power of administration and can organize his business to ensure the efficient running of the undertaking whilst complying with relevant employment laws and regulations including any remuneration orders (**vide Cayeux Ltd v De Maroussem 1974 MR 166, L'ingénie v Baie du Cap Estates Ltd, 2000 SCJ 171, G.Rousseau & Ors v Le Warehouse Ltd, RN 1013, The State Bank of Mauritius Staff Union v State Bank of Mauritius Ltd, RN 1001**). In a case involving redeployment following injury sustained, there are many factors and parameters to be considered including, availability of suitable alternative work, reasonable accommodation which can be made by the employer, the willingness of the worker to continue offering his services and so on.

Redeployment of a worker following 'light duty' requires no doubt proper communication and consultation between management and the worker concerned, and mutual effort on each side. "Fairness" is very important in employment matters and even more important in a redeployment exercise following an injury sustained by the worker. However, the Tribunal certainly cannot make an award of such a general nature that Respondent should provide (underlining is ours) Disputant an alternative job with monthly revenue more or less equivalent to his revenue at his initial post when Disputant was previously working as RTG Operator and there is evidence that in 'Operations', one may earn overtime, productivity bonus and staggered meal allowance amongst others. He can no longer perform as RTG Operator now. The basic salary of Disputant has been maintained though and the Tribunal cannot find that there is an obligation on the Respondent to provide overtime or productivity bonus to Disputant when these do not arise in the Stores department where he is now posted. The Respondent has adduced evidence to explain how steps were taken to regularize the status of some eleven workers who were on 'light duty' for some time at the Respondent and this evidence has not been seriously challenged. Disputant was working in the Store when the steps and offers were made and thus the offer was made to him to be redeployed in the Store. As per the unchallenged evidence on record, the same procedure was adopted for the ten others.

The Tribunal is unable, on the basis of the pleadings before it and the evidence adduced, to find that the Respondent should provide Disputant an alternative job with monthly revenue more or less equivalent to his revenue at his initial post. We presume the emphasis was on overtime and other benefits obtained as RTG Operator even though no particular evidence was adduced of his pay packet or monthly revenue in his initial post as RTG Operator, that is, before the accident and when he was actually performing the work of RTG Operator. Also, the redeployment exercise is as per an "offer" made or reiterated (as per Doc H) and the Tribunal certainly cannot award as to how the Respondent is to make "his" offer. Though the words "or otherwise" have been used in the terms of reference, the Tribunal cannot award as per the terms of reference. In any event, the Tribunal is not satisfied on a balance of probabilities that Respondent should only provide Disputant with an alternative job with such accompanying benefits as Disputant was allegedly earning when he was actually performing as RTG Operator.

Also, the Tribunal is not convinced at all that Disputant was no longer on 'light duty' when he had produced a medical certificate to his employer for 'light duty' and that same was accepted following examination by Respondent's doctor. There is no evidence of any communication informing Disputant that he would no longer be on "light duty" as from any date. The clear and straightforward testimony of Mr Dahari for the Respondent is to the effect that one is on "light duty" when one is not actually performing the job (in this case RTG Operator) for which he is employed by the

Respondent. In this case, until now Disputant is not performing the job of his substantive post.

For all the reasons given above, the Tribunal finds that the Disputant has failed to show on a balance of probabilities in this particular case that the Respondent should provide him an alternative job with monthly revenue more or less equivalent to his revenue at his initial post. The dispute under limb 1 is thus set aside.

As regards the dispute under limb 2, there is unchallenged evidence from Mr Dahari that there is a long established practice in the port that when someone is on 'light duty' and is thus not performing in his substantive post, then the worker is not entitled to increments. It is not challenged that Disputant is not performing in his substantive post (that is as RTG Operator) and thus the Tribunal has no hesitation in finding that Disputant has not proved on a balance of probabilities that he ought to be granted his annual increment for the year 2019. The second part of the dispute under limb 2 is closely related to the first part of the dispute under the same limb. Also, no evidence has been adduced as to why Disputant should be reinstated on the salary point of the salary scale of RTG Operator. Clearly, this dispute cannot stand since Disputant is no longer working as RTG Operator but is currently performing an alternative job in relation to the store. Only his basic salary has been maintained in fairness to him even though he may now be performing in a post with a relatively lower salary scale. There is absolutely nothing on record to suggest that Disputant should be reinstated on the salary point of the salary scale of RTG Operator. For the reasons given above, the dispute under limb 2 is also set aside.

SD Indiren Sivaramen

Vice-President

SD Marie Désirée Lily Lactive

Member

SD Karen K. Veerapen

Member

SD Ghianeswar Gokhool

Member

4 October 2019