

**EMPLOYMENT RELATIONS TRIBUNAL**

**DETERMINATION**

**ERT/ RN 99/24**

**Before**

<b>Indiren Sivaramen</b>	<b>Acting President</b>
<b>Bhawantee Ramdoss</b>	<b>Member</b>
<b>Kirsley E. Bagwan</b>	<b>Member</b>
<b>Ghianeswar Gokhool</b>	<b>Member</b>

**In the matter of:-**

**Mr Tamodharen Chinien Chetty (Complainant)**

**And**

**Newrest (Mauritius) Ltd (Respondent)**

The above case has been referred to the Tribunal under the direction of the Supervising Officer acting under Section 69A(2) of the Workers' Rights Act, as amended. Both parties were assisted by Counsel. The point in dispute in the terms of reference reads as follows:

*"Whether the termination of employment of Disputant is justified or not in the circumstances and whether Disputant should be reinstated or not."*

The Tribunal proceeded to hear the case, and the Complainant deposed before the Tribunal. He stated that he joined the Respondent as 'Kitchen Commis A' in November 2016 and at the relevant time, the name of the company was EIH Flight Services. In November 2017, his contract was renewed as 'Kitchen Commis A' and in August 2019 he was confirmed in his employment on a permanent basis. In September 2022, he was promoted as 'Chef de Partie'. He stated that he has had no problem with the Respondent during the time that he has worked there, that is, for nearly eight years. He was shown copies of two disciplinary action sheets, and he stated that he was not aware of them and was never given same. He did not agree that he was given these letters (disciplinary action sheets) and that he allegedly refused to take them. He stated that the letters were only produced before him at the disciplinary committee. He stated that his signature does not appear on any of those 'warning' letters. He did not agree with the charges which were levelled against him in the letter of charges.

He stated that he never insulted, nor swore at nor humiliated his colleague. He stated that on 22 July 2024 he was holding a saucepan with egg and needed a piece of butter. He went to look for a spatula in “la plonge batterie” but there was none. The spatulas were hung near the extractor, and he took one. Then Mr Mukhood who is also a ‘Chef de Partie’ told him “ki jamais mo ramasser, pourtant mo content servi”. He stated that he replied to the latter “kan mo ramasser to pas trouver”. The latter replied “non, mo pas trouver”. He used the spatula, washed it and hung it and continued his work. He then took his trolley “pou mo alle prend mo mise en place”. Mr Mukhood reproached him that every time there are problems with him during breakfast. He replied that “si tout le temp ti ena problem lor breakfast, mais jamais ene avion pas fine aller sans breakfast ou fine reste lor la piste”.

He stated that he speaks with a loud voice. He added that the extractor in the kitchen makes a lot of noise and that one has to speak loudly. He stated that he never insulted his colleague, nor swore at or humiliated the latter. He did not agree that the General Manager had to intervene on that day because of his behaviour. He stated that the latter came when he heard noise in the kitchen and the latter saw him and Mr Mukhood arguing. When he approached the General Manager to explain what had happened, the latter told both of them to go and do their work. He did not agree that he had breached the policy and code of conduct of the Respondent. He added that before the disciplinary committee the code of conduct was never put to him. He stated that the disciplinary hearing was held on 16 August 2024 and that he denied all four charges levelled against him. Following the disciplinary hearing, the Respondent terminated his employment. He produced a copy of the letter of termination (Doc K) and stated that he does not agree with the reasons given in the letter of termination.

Complainant stated that the letter of termination is dated 20 August 2024 but that he received the letter only on 27 August 2024. He suggested that he saw a post office notification near his door, and he went to collect the letter immediately at the post office. He was then informed that this was in fact a second notification. He stated that he told the officer that he had never received the first notice. He averred that he did not receive messages allegedly sent to him by the Respondent and he added that his mobile phone was lost. He stated that he gave a declaration to the police on 23 August 2024 and took a certificate from the police to be able to buy another sim card with the same phone number that he was using. He did not agree that he was trying to avoid representatives of Respondent who came to his place to give him the letter of termination. He stated that he was ill and stayed at his place every day. He prayed to be reinstated in his job and did not agree that the relationship between the Respondent and him had broken down irretrievably. He is currently not working. He stated that he had a good relationship with his employer and with his fellow colleagues before this incident.

In cross-examination, Complainant agreed that he was given a letter of suspension, a letter of charges and was convened to appear before a disciplinary committee. He agreed that he was assisted by Counsel before the disciplinary committee. He stated

that he came to know that his contract of employment was terminated only on 27 August 2024 when he received the letter. He agreed that during his suspension he had to be reachable by phone or at his home address. He conceded that he did not inform the Respondent that he was ill nor that he had lost his mobile phone. He did not agree that following the disciplinary committee he deliberately remained unreachable for the Respondent. He stated that the Head of Department, the HR Manager and the General Manager all plotted against him. He averred that when the disciplinary committee started, he was not aware of the letters of warning. Also, he did not agree that on 29 July 2024 he met with the HR Manager and specifically requested the latter for copies of both warning letters. He stated that in the Tribunal he was trying to “appaire mo la voix”. He averred that if he spoke normally, his voice would be louder. He agreed that in the kitchen he was speaking loudly. He did not agree however that he was yelling (“un hurlement”). He did not agree when it was put to him that he had also yelled at one Mrs Chatun on her first day of work at the Respondent to such an extent that the latter felt ashamed. He agreed that harassment and “violence verbale” at the place of work are wrong but he did not agree that he harassed or humiliated someone at his place of work.

Complainant stated that he lost his mobile phone on 19 August 2024 when it was put to him that the Human Resources Assistant tried to reach him on his phone at least ten times on 19 August 2024 and at least nine times on 20 August 2024. When it was put to him that the Respondent had on 20 August 2024 sent a registered letter to his residential address and that the letter reached the said address on 21 August 2024, he stated that it was only on 27 August 2024 that he saw the notice and went to fetch the letter at the post office where he was informed that this was in fact a second notice. He suggested that he did not receive the first notice. He also stated that he was not aware when it was put to him that the Respondent sent two of its employees to come to his place to inform him that he was required to attend his place of work. He averred that he was at his place but that he was ill and had taken medicines. He stated that he did not hear anybody knocking at the door. When it was put to him that on 20 August 2024, another group of officers came to his house, he stated that he was not aware. He suggested that he had been ill since 19 August 2024 and was at his place. He stated that it was only on 23 August 2024 when he felt better that he went to give a declaration to the police that his mobile phone was lost, and he took a memo to purchase another sim card with the same number as his existing one. He did not agree when it was put to him that the Respondent considers that it cannot reintegrate him in his employment.

Mr Ramano, a Security Manager, then deponed before the Tribunal and he stated that on 20 August 2024 he accompanied two officers of the HR department at Mahebourg at the place of residence of the Complainant. He conceded that he did not know where the Complainant resided. However, he suggested that as an ex-police officer he knew Mahebourg and the “Chetty” family well and that he knew “ki tous bann Chetty habite la bas.” Eventually, he saw a car which, according to him, was the same car in which

he used to see the Complainant come to work. He knocked at the door where the car was parked but nobody answered. One of the ladies with him then phoned Complainant but there was still no answer. They then went to Mahebourg post office and one of the ladies went to post the letter addressed to the Complainant. On 22 August 2024, he again went there at Rue des Mares, Mahebourg and this time Chef Ruben was with him. The latter knew where Complainant resided, and it was indeed the same house where he had knocked at the door the first time. They knocked at the door, waited for quite some time and even phoned Complainant but there was still no answer.

In cross-examination, the security officer stated that it was only Chef Ruben who confirmed that the house was indeed the house of the Complainant. He did not meet the Complainant on that day and did not remit any letter to the latter.

Mr Gopaul, a Junior Sous-Chef deponed at another sitting of the Tribunal and he stated that on 22 July 2024 at around 9.30 – 10.00 hrs there were about six to seven staff members in the kitchen. He stated that Mr Mukhood had already done his 'mise en place' and the Complainant came and took a "louche" (ladle). Mr Mukhood then told him "kan to fini servi louche la to mette li dans so place". He stated that Mr Mukhood normally speaks with a loud voice and that when he told the Complainant this, the latter apparently did not like the manner in which Mr Mukhood had spoken to him. He stated that the tone of voice used by the Complainant was not normal and that action had to be taken against such a type of behaviour. In cross-examination, he agreed that Mr Mukhood was talking loudly, and that the Complainant did not appreciate same. He agreed that before the disciplinary committee he did not mention the exact words which the Complainant had told Mr Mukhood. He agreed that he did not refer to any humiliation which Mr Mukhood may have suffered nor to the Complainant insulting the latter.

Mr Mukhood, a 'Chef de Partie' then deponed before the Tribunal and he stated that on 22 July 2024 he told the Complainant who was in the kitchen "kan to fini servi, to garde li dans so place". He stated that he was referring to the kitchen equipment. He stated that the Complainant started to shout at him and told him "pas pour toi ça" and that "li en droit servi". He stated that the Complainant was not happy about what he had said to the latter and told him in an aggressive manner "guetter ki to pour faire, lors enn ton coumadire excité." He suggested that he was shocked and afraid since nobody had talked with him like that before. He stated that the Complainant had a spatula in his hand and was talking in an aggressive manner. He averred that the General Manager was walking in the corridor, and he came in and talked with the Complainant. The Complainant then calmed down.

In cross-examination, he agreed that in the statement he had given to the Respondent, he did not refer to being humiliated. He suggested that when giving evidence before the disciplinary committee he had said that he was humiliated. After he had given his statement in relation to the incident, he returned to his place of work. However, he

suggested that he felt disturbed by the incident. He did not agree that he spoke in a loud voice.

Mr Ajoodah, a Cook in the hot kitchen then deponed and he stated that on 22 July 2024 the Complainant was vis-à-vis him. The latter went to take a spatula, and the “chef” there told him “kan to fini rend enn service remette li dans so place.” The Complainant was not happy, lost his temper and shouted. The Complainant allegedly stated in an aggressive tone “pas pour toi ça, cot mo envi mo mette li, guetter ki to pour capave faire.” The witness did not agree that one needs to talk loudly in the kitchen because of the extractor. He suggested that he was shocked since the Complainant was talking with a “chef” like that. He stated that he could not intervene since he was a Cook and that it was another “chef” who could do so. He was not agreeable for the Complainant to be reinstated, and he stated that he believed that the Complainant may make an abuse of his tone of voice when speaking with his colleagues.

In cross-examination, he stated that apart from the words which were put to him by counsel, nothing else happened. He stated that the General Manager intervened, but he could not say what the latter had told the Complainant. In re-examination, he stated that the tone of the voice of the Complainant was not the same after the General Manager had spoken with the latter.

Mrs Chatun, a Catering Agent deponed before the Tribunal and she stated that on her first day of work at the Respondent, Complainant asked her to crush a tomato to make a “compote”. She suggested that the Complainant “pena manier coser”. She stated that she was in the kitchen on 22 July 2024 and Mr Mukhood told the Complainant “tonn prend sa calchul la, cote tonn prend li to garde li la bas”. She stated that the Complainant then stated “cote moi mo envi mo garder, pas pou toi ça.” She averred that the Complainant was shouting. She stated that she was afraid and then stated “arrêter do”. She stated that the Complainant had “mal cose” with her previously and she had felt humiliated and did not want to continue working there. She complained about same with the HR Department. She stated that the Complainant had a loud voice and that on 22 July 2024, the latter lost his temper when he was talking. She averred that she would stop working at the Respondent if the Complainant returned to work at the Respondent.

In cross-examination, she stated that since her first day at the Respondent, she has had problems with the Complainant. The witness was not very clear when she was questioned in relation to the tone of voice of the Complainant generally.

A HR Assistant then deponed as representative of the Respondent before the Tribunal. She works in the Human Resource Department at the Respondent, and she initially stated that the Complainant had no warning and then she stated that the latter had two warnings which were given to the latter on 9 June 2024. She stated that she knew that the Complainant had received a warning because of his behaviour since at

a meeting with the then General Manager, the Complainant had slammed the door and had left the meeting. The HR Manager then told her to prepare a warning for the Complainant. She stated that the second warning was because of the Complainant's attitude towards Mrs Chatun who had just joined the company. She suggested that the Complainant had a dispute with the latter and the HR Manager asked her to prepare a warning. She averred that it was the then General Manager who came to the HR Manager to report what had happened. She then stated the then General Manager, the Executive Sous Chef Mr R.Dasseea and the HR Manager signed on the warning. She stated that she was in her office and the HR Manager sent her a "Whatsapp" on their whatsapp group and asked her to bring the warnings of the Complainant. She stated that she immediately removed the two warnings and went to give same to the HR Manager. She suggested that the Complainant was present in the office of the HR Manager. The Complainant then told the HR Manager that he would not sign and that he would go and see his counsel and his trade union.

As regards the second warning, she stated that Mrs Chatun and the HR Manager had explained to her what had happened. She then drafted the warning. She stated that the Executive Sous Chef came to see the HR Manager in relation to the incident involving Mrs Chatun since the latter wanted to quit her work. The version of the Complainant that warnings were issued to him without him being even aware that he was issued with such warnings was put to the HR Assistant, and the latter simply stated that the Complainant knew because when she went to give the warnings to the HR Manager, the Complainant was in the office of the HR Manager. She stated that it was the HR Manager who related to her the incident which occurred on 22 July 2024. The HR Manager told her that the relevant officers would come to the HR office to write their statements. Mr Gopaul, Mr Ajoodah, Mr Mukhood and Mrs Chatun came to her office. She was aware that the Complainant was suspended and that a disciplinary committee was held. Following the report of the disciplinary committee and recommendations made, the "Human Resource office" decided to terminate the contract of employment of the Complainant and a termination letter was issued to the latter.

The HR Assistant stated that the HR Manager called her and asked her to phone the Complainant to inform him that he had to come to the office to take his letter on 20 August 2024. She could not reach the Complainant on the phone, and she sent a message asking the latter to come at the office on Tuesday 20 August 2024. Since the Complainant was not taking her calls, the HR Manager asked her to take Mr Ramano and to go to the place of the Complainant in Mahebourg. She was also accompanied by another officer. They looked in vain for the Complainant and later she went to the post office and posted the letter by registered mail and express delivery.

In cross-examination, the HR Assistant stated that she did not depone before the disciplinary committee. She was the one who was taking minutes for the said disciplinary hearing. She agreed that statements were recorded from witnesses and

that no one referred to humiliation or insult in those statements nor before the disciplinary committee. She agreed that despite that, the Respondent proceeded to level four charges against the Complainant in relation to humiliation and insult. She agreed that the contract of employment was terminated since all four charges had been proved against the latter and secondly, because the Complainant had stated that he was not aware of the two warnings. The HR Assistant stated that she did not make any entry or written note that she had tried to give the Complainant the letter but that the Complainant refused to sign same. Also, the Respondent did not send any of the warnings by post to the Complainant. She agreed that there was no record that the Complainant had allegedly tendered his apologies to the then General Manager. She also accepted when it was put to her that since there was no proof that the Complainant had allegedly received or refused to take or refused to sign on the warnings, the Respondent could not put forward that the purported unawareness of the Complainant of the two severe warnings had exacerbated the findings of the disciplinary committee.

When it was put to the representative that there was no reason to terminate the employment of the Complainant, the HR Assistant stated that she could not answer for the HR Manager. She could not say if the termination of the contract of employment was justified or not. She agreed that the letter of charges did not refer at all to the letters of warning. She agreed that during the disciplinary committee and even after, no new charges were brought against the Complainant. She agreed that the then General Manager did not depone before the disciplinary committee and that the policy and code of conduct of the Respondent were not produced before the disciplinary committee. She agreed that they did not meet the Complainant on the day they went to give the letter to the latter. She agreed that the Complainant thus did not refuse to take the letter. She stated "*ti donne li warning*", but at the same time she agreed that there was no proof that the Complainant had refused to sign the warnings or that Complainant actually received the warnings. She initially stated that on 9 July 2024 the Complainant refused to sign the warnings issued to him. She then stated that the HR Manager would have asked her on 12 July 2024 for scanned copies of the warnings against Complainant. She was most hesitant on this issue, and this time she stated that she saw the Complainant on 12 July 2024 and that the latter allegedly refused to take the letters.

The Tribunal has examined carefully all the evidence on record including the submissions of both Counsel. The incident occurred on 22 July 2024 and even if the Complainant had uttered the words mentioned by the witnesses called on behalf of the Respondent in a loud and irritated voice, this would not have warranted the termination of the employment of the Complainant. The Tribunal has examined carefully all the words mentioned and it would appear that each witness called on behalf of the Respondent deponed before the Tribunal by referring to only part of the words allegedly uttered. The act of the Complainant may have constituted a misconduct, but the Tribunal has no hesitation in finding that even if the charges

levelled against the Complainant had been found proved, these charges which are very much intertwined, were not sufficient to put the Respondent in a situation where he could not, in good faith, take any other course of action than to terminate the contract of employment of the Complainant.

In the case of **Mr Suraj Auckle v Princes Tuna (Mauritius) Ltd, ERT/RN 12/2024**, the Tribunal stated the following:

“When effecting termination of the worker’s agreement for any alleged misconduct, the employer must ensure that it cannot in good faith take any other course of action. This is amply reflected in section 64 (2)(a)(iv) of the WRA:

**64. Protection against termination of agreement**

...

(2) Subject to subsection (3), no employer shall terminate a worker’s agreement –

(a) for reasons related to the worker’s alleged misconduct, unless

–

...

(iv) the employer cannot in good faith take any other course of action; ...

As per the reproduced paragraph of the termination letter, the Respondent has simply stated that it shall have no other alternative than to terminate the Disputant’s contract of employment. However, the Respondent’s witness, Mrs Chingen agreed that the employer has a duty to ask itself whether it can terminate the employment in good faith and was adamant that management had explored all avenues before reaching the decision.

It is apposite to note the following from the Judicial Committee of the Privy Council judgment in *United Docks Ltd v De Speville [2019] UKPC 28* on the element of good faith in the context of termination of employment:

24. A question whether the company had a valid reason to dismiss the respondent is obviously different from a question whether it could not in good faith take any other course than to dismiss him. The former asks only whether the misconduct was a ground for dismissing him. The latter asks whether in all the surrounding circumstances the only course reasonably open to the employer was to dismiss him. In other words, was it, as the Board said in para 17 of its judgment in *Bissonauth v The Sugar Fund Insurance Bond [2007] UKPC 17*, “the only option”?



25. ... It suffices to say no more than that the Board sees no reason to interfere with the Supreme Court's conclusion that the company had failed to establish that it could not in good faith take any other course than to dismiss the respondent."

The Tribunal notes that as per the evidence of all the relevant witnesses and more specially the evidence of Mr Gopaul, Junior Sous-Chef, it is the said Mr Mukhood who 'triggered' the said incident by uttering the words which he did. There is evidence from Mr Gopaul that the said Mr Mukhood had spoken in a loud tone to the Complainant and that he believed that the Complainant had not appreciated the manner in which Mr Mukhood had spoken to him. The Tribunal notes that both Complainant and Mr Mukhood stated that they were 'Chef de Partie'. The Tribunal again bears in mind the words which were allegedly said. Mr Mukhood and Mrs Chatun suggested that they were afraid because of the tone and words uttered by the Complainant, but the Tribunal has not been convinced at all by their testimonies that they were indeed afraid. The same Mrs Chatun even stated that during the incident which involved two officers who were her superiors, she intervened by saying "*arrêter do*". The Tribunal does bear in mind the context in which this incident occurred, where the relevant workers were preparing food to be served in airplanes, the nature of the work, and possible repercussions if work is hindered by such incidents but even then, is not satisfied that the acts and behaviour of the Complainant, bearing in mind the words which the Complainant allegedly said even though he might have been "excité" amounted to "*une cause réelle et sérieuse*" which held a bearing on the employer-employee relationship to the extent that it brought "*un trouble profond dans le fonctionnement et la marche de l'entreprise*".

The Tribunal will refer to **Dr D. Fok Kan, Introduction au droit du travail Mauricien, 1/Les Relations Individuelles de Travail, 2eme édition**, at page 379 where the author writes :

*244. Par contre n'ont pas été considérées comme fautes graves privatives de l'indemnité de licenciement :*

*...de la part d'une employée ancienne un incident mineur (jet d'une feuille de papier à la figure d'une contremaîtresse) ;*

*..quelques manifestations de mauvaise humeur et écarts de langage d'un chef de service ancien ; (...)*

The present case can be easily distinguished from cases like **Town Council Beau Bassin Rose Hill v. Jennah (1969) MR 18**, where the worker used coarse and vulgar language "with an added element of abuse" and an "unveiled threat of violent retaliation" towards an inspector of the Council (vide Dr Fok Kan (above) at page 377).

The present matter may also be distinguished from the case of **Roberts Francois Rhainsley Remy v Trait D' Union Ltee 2023 IND 63** (for example) where it was alleged that the plaintiff had used words of racist connotation.

In the present case, a Letter of Charges & Suspension was issued to the Complainant, and it contained the following:

1. *You have on or about the 22<sup>nd</sup> July 2024, whilst being in the hot kitchen of the Company, insulted and humiliated a fellow colleague in front of other employees of the Company, in a high pitched tone, by uttering the following words in the creole “ale gete ki to pu kapav fer”, amongst others.*
2. *You have on or about the 22<sup>nd</sup> July 2024, whilst being in the hot kitchen of the Company and during the course of your duties, acted in an unruly manner which necessitated the intervention of the General Manager of the Company to restore order on the premises.*
3. *You have by your aforesaid acts and doings acted in breach of the Company's Policy and Procedures, including the Code of Conduct the Company.*
4. *You have on or about the 22<sup>nd</sup> July 2024, during the course of your employment with the Company and during office hours, whilst being in the hot kitchen of the Company, acted in a manner which is tantamount to violence at work in breach of section 114(1)(c) of the Workers' Rights Act 2019 (as amended) in that, you have humiliated and/or insulted another employee of the Company in the course of his and your work.*

*Further to the above charges, Management reserves its right to level any additional charges, as it may be advised.*

The Tribunal notes that though there were four charges levelled against the Complainant these pertain to one and the same incident which occurred on 22 July 2024. Several witnesses deponed, and the Tribunal is satisfied that there was indeed a discussion between Complainant and Mr Mukhood. The Tribunal finds that there was however no evidence of Complainant “humiliating” or “insulting” his fellow colleague or other colleagues. There was no personal attack on Mr Mukhood, no racial or gender-based insult or personal attacks on the abilities of Mr Mukhood, and above all, no threatening remarks in the words said by the Complainant.

In the present case, however, the Respondent is also relying on warnings (disciplinary action sheets produced and marked Docs D and E) allegedly issued to the Complainant. The Tribunal notes that the alleged disciplinary action sheets were mentioned in the answer to particulars dated 14 August 2024 as being documents which the Respondent intended to produce at the disciplinary proceedings. The evidence given on behalf of the Respondent in relation to those alleged warnings is

most unsatisfactory. Three officers signed each of the two disciplinary action sheets (Docs D and E) and none of those officers were called to depone before the Tribunal. More importantly, there is absolutely no evidence as to how those warnings would have been communicated and given to the Complainant. The intention to give a warning to an employee is neither here nor there. A warning or a warning letter must be issued to the employee for it to be a warning. The employee is thus informed of his problem and the negative impact which his acts or behaviour may be having on the organisation as a whole. Necessary support for the said worker may even be considered in an appropriate case, but it is only through effective communication of the warning that the whole exercise will serve its purpose and assist an employee in changing its conduct or behaviour for good employment relations. A warning is certainly not issued to an employee if a disciplinary action sheet is simply 'made' and kept in the latter's file.

It is apposite to note that though Docs D and E appear to be meant to stand for 'oral warnings' (since 'Severe Warning' is highlighted as opposed to 'Severe Written Warning' on Doc D and 'Severe Final Warning' is highlighted as opposed to 'Written Warning' or 'Severe Written Warning' on Doc E), yet they are forms of disciplinary actions ("*les sanctions morales*"). In **Dr D. Fok Kan (see above)** at page 238 it is provided:

### **1. Les Sanctions Morales**

*Les sanctions morales sont les avertissements – verbaux ou écrits<sup>2</sup>. Ces sanctions sont morales dans le sens qu'elles ne sont sensées agir que sur la psychologie de l'employé, n'ayant aucun effet immédiat sur le plan matériel. Il est à remarquer que pour le législateur français « une observation verbale » ne constitue pas une sanction disciplinaire<sup>3</sup>. (...)*

2. *Le droit français fait une distinction, qu'on ne retrouve pas en droit mauricien, entre avertissements et simples observations écrites. Ces dernières ne sont pas considérées comme des sanctions et ne sont ainsi pas sujettes au contrôle judiciaire. La ligne de démarcation entre les deux peut toutefois être très mince. C'est ainsi que pour le Prof. Deprez « quand l'employeur articule des griefs, en informe les salariés et leur fait des remontrances sur leur défaut de production, on n'est pas loin de voir réunis les éléments de fond et de forme qui font la mesure disciplinaire et on ne voit pas en quoi une admonestation délivrée dans de telles conditions (décision écrites, motivée, communiquée aux intéressés) serait moins une sanction disciplinaire que l'avertissement écrit » (Cass. soc. 22 janvier 1991, Mars c/ Air France, RJS 6/91. 363 Chronique du Prof. J. Deprez). La Cour de cassation dans l'espèce avait jugé que cette correspondance ne constituait pas une sanction.*
3. *L'art. L.122-40 du Code du Travail.*

In the present case, the Tribunal has not been satisfied at all (underlining is ours) that the Complainant was indeed issued with the two warnings. Firstly, even the HR

Manager did not mention clearly before the disciplinary committee that the warnings were issued (underlining is ours) to the Complainant, that is, after each of the alleged incident on or around 9 May 2024 and 12 July 2024 respectively (as per Docs D and E). Instead, statements like the Complainant tendered his excuses were made for whatever these were worth. Yet, the Respondent wants the Tribunal to believe (in the absence of reliable evidence) that the Complainant refused to sign or acknowledge the warnings. The whole process should have been properly documented so that there was a record of what exactly took place. There is no evidence of any action which would have been taken against the Complainant following his alleged refusals to sign or acknowledge receipt of the said disciplinary action sheets. The Tribunal bears in mind the averment of the Respondent at paragraph 8c of his Statement of Case which reads as follows:

*8c. On both occasions the Complainant, in utter bad faith, outright refused to accept and/or sign the warning letters, demonstrating a blatant and intentional breach and disregard of the Respondent's established code of conduct and acts of insubordination. (underlining is ours)*

Yet no action at all was taken against the Complainant in the face of such alleged acts which, if true, would amount to no less than blatant acts of insubordination, which no sensible employer could reasonably tolerate. This is very hard to believe, to say the least. There is no evidence that the two warnings were indeed “issued” to the Complainant and the person who could enlighten the Tribunal on this issue was the Human Resource Manager and the latter was not called as a witness. Moreover, there is no mention at all in the two disciplinary action sheets (Docs D and E) or in the oral testimonies before the Tribunal that the version of the Complainant was at any point in time sought before the warnings were issued.

In his Statement of Case, the Respondent at paragraph 8e averred that on 29 July 2024 the Complainant allegedly requested a copy of both warning letters from the Human Resource Manager. In the same paragraph, it is mentioned that the said warning letters were promptly remitted to the Complainant in person by the Human Resource Manager. (underlinings above are ours). Yet, the Human Resource Manager did not depone before the Tribunal to enlighten the Tribunal. Also, and very importantly, remitting a copy or copies of alleged warnings (which were not issued) to a worker much after the alleged events does not amount to the issuing of the said warnings to the said worker.

The Tribunal also notes the evidence of the HR Assistant when she initially stated (though later she rectified same) before the Tribunal that there was no warning in the file of the Complainant.

The manner in which the termination letter (Doc K) has been drafted has also drawn our attention. Indeed, in the said letter it is provided that:

*The Management of the Company has been apprised of the findings of the Report of the Chairperson of the Disciplinary Hearing whereby you were found guilty of misconduct on all charges laid. We have given due consideration to the matter before us. We note this is exacerbated by your purported unawareness of the existence of two severe warnings, including a final warning, that already lies against you, on your employee record. The Company maintains that the irresistible conclusion is that two severe warnings including a final warning could not have been unknown or oblivious to you.*

The Respondent does not refer to termination of the employment of the Complainant because of the charges found proved against him and in the light of the (alleged) 'warnings' already issued to the latter. Instead, the Respondent with quite some difficulty, as is highlighted in that part of Doc K quoted just above, suggested that it was the purported unawareness of the Complainant of the existence of the two warnings against him which exacerbated the matter and not the two warnings *per se*.

The Tribunal is not satisfied that the Complainant was properly issued with any of the two alleged warnings. For the reasons given above, the Tribunal is also not satisfied at all that the charges levelled against the Complainant were such that the Respondent could not in good faith take any other course of action than to terminate the employment of the Complainant. Also, it is apposite to note that all the charges were found proved in this case despite that the General Manager was not called to depone before the disciplinary committee and that the Company's Policy and Procedures were admittedly not produced before the disciplinary committee. For all the reasons given above, the Tribunal finds that the Complainant has proved on a balance of probabilities that the termination of his employment was not justified and that the claim for reinstatement is justified.

In the light of our findings above, the issue concerning notification of the termination of employment within the mandatory timeframe becomes less material. However, for the sake of completeness and in the light of the evidence adduced and submissions of both counsel on this issue, the Tribunal will nevertheless address this issue also. The relevant provisions of the law are sections 64(2)(a)(v) and 65 of the Workers' Rights Act which read as follows:

**64. Protection against termination of agreement**

[.]

*(2) Subject to subsection (3), no employer shall terminate a worker's agreement –  
(a) for reasons related to the worker's alleged misconduct, unless –*

[...]

*(v) the termination is effected not later than 7 days after the worker has answered the charge made against him in an oral hearing.*

## **65. Notification of charge**

(1) *A notification of a charge, a notice to answer a charge and a notification of a termination of agreement shall be issued by –*

- (a) causing the notification or notice to be handed over to the worker in person; or*
- (b) sending the notification or notice by registered post to the usual or last known place of residence of the worker.*

(2) *Where a worker –*

- (a) refuses to accept delivery of the notification or notice; or*
- (b) fails to take delivery of the notification or notice after being notified that it awaits him at a specified post office,*

*the notification or notice shall be deemed to have been duly served on the worker on the day he refuses to accept delivery thereof or is notified that it awaits him at the specified post office.*

In the case of **Rakesh Mohabeer v Food and Allied Industries Ltd 2014 IND 5**, the Industrial Court, in a very detailed judgment with a thorough analysis of the state of the law (with persuasive authority and though in relation to the relevant section of the then Employment Rights Act) stated the following:

### **“B. Mauritian Law**

*The relevant section of the law dealing with the present issue is Section 38(2) (v) of the Employment Rights Act 2008 [the ERA 2008]. Section 38 (2) reads as follows:*

*(2) No employer shall terminate a worker’s agreement –*

*for reasons related to the worker’s misconduct, unless –*

- (i) he cannot in good faith take any other course of action;*
- (ii) the worker has been afforded an opportunity to answer any charge made against him in relation to his misconduct;*
- (iii) he has within, 10 days of the day on which he becomes aware of the misconduct, notified the worker of the charge made against the worker;*
- (iv) the worker has been given at least 7 days’ notice to answer any charge made against him; and*
- (v) the termination is effected not later than 7 days after the worker has answered the charge made against him, or where the charge is subject of an oral hearing, after the completion of such hearing;*

*Section 38 (2) (v) of the ERA 2008 has replaced Section 32 of the former Labour Act 1975, which is headed “Unjustified termination of agreement”. Section 32(1)(b)(ii) of the Labour Act provided as follows:*

(1) *No employer shall dismiss a worker –*

(a)...

(b) *for alleged misconduct unless –*

(i) *he cannot in good faith take any other course; and*

(ii) ***the dismissal is effected within 7 days of***

(A) *where the misconduct is the subject of a hearing under subsection (2), the completion of the hearing;*

*As it can be noted the main difference between the provisions of the Labour Act and the Employment Rights Act, as regards the time limit to take a decision where there has been a hearing is that a decision to dismiss an employee has to be made:*

- (i) ***within 7 days of*** the completion of the hearing under the Labour Act, the date of the hearing being inclusive and
- (ii) ***not later than 7 days after*** the completion of the hearing under the ERA, the date of the hearing not being inclusive.

*It follows therefore that the previous decisions pertaining to the time limit within which an employer has to take a decision after a disciplinary committee under Section 32(1)(b)(ii) of the Labour Act are relevant and applicable to Section 38 (2) (v) of the ERA 2008.*

*The rationale for setting up a time limit has been explained by the Supreme Court in the case of **Mahatma Gandhi Institute v. Mungur [1989 SCJ 379]** where the time-limit was described as being based on sound principles. The Supreme Court stated the following:*

*“Both from the point of view of the worker and that of the employer, it is in their best interests that the contractual bond be severed within a definite period of time when the continued employment of the worker becomes impossible through his proven misconduct.”*

*The effect of failing to comply with the statutory time limit has been stated in the case of **Happy World Marketing Ltd v. Agathe [2005 MR 37]** where it was said that:*

*“If an employer does not dismiss a worker within the mandatory statutory limit of seven days, he is deemed to have waived his right to dismiss the worker for serious misconduct and not to pay severance allowance (section 35(1) of the Act) so that any subsequent dismissal becomes unjustified and attracts severance allowance at the punitive rate, irrespective of whether he has or not a valid reason to discontinue with the employment of the worker, with or without payment of severance allowance at the*

normal rate – vide section 36(7) of the Act.” (see also **P. Gopaul v. Le Méridien Hotel and Resorts Ltd [2011 SCJ 371]**; **High Security (Guards) Ltd. v. Fareedun [2009 SCJ 48]**)

According to **J. Martin de la Moutte** in his book **L’acte juridique unilatéral: essai sur sa notion et sa technique en droit civil (1951)**:

*Un acte juridique unilatéral est receptice lorsqu’il a pour fonction directe soit une information ou un ordre juridique fait au destinataire de l’acte soit lorsqu’il comporte une atteinte aux droits d’autrui.*

*Certains actes unilatéraux n'ont d'existence juridique sous la condition d'avoir été portés, par une notification, à la connaissance de la personne envers laquelle ils sont appelés à produire effet. De telles (sic) sont qualifiés receptices, par opposition aux actes non-receptices, dont l'efficacité n'est subordonnée qu'à la manifestation de volonté de leur auteur. Sont notamment receptices: la mise en demeure, adressée à un débiteur, d'avoir à exécuter son obligation; le congé en matière de bail; la révocation du mandat, le licenciement de salariés. Plus généralement, ce caractère doit être reconnu à tout acte par lequel l'une des parties à un contrat exerce une faculté unilatérale de rupture. Au contraire, le testament, par exemple, n'est pas receptice.”*

*This point was authoritatively determined by the Judicial Committee of the Privy Council in **Mauvilac Industries Ltd. v. M. Ragoobeer 2006 PCA 33 [2007] MR 278**, when it stated the following:*

*“...Clearly, dismissal is a unilateral act: to take effect, it does not require any action by the person who is dismissed. Some unilateral acts are effective without the person affected having to be told about them (actes non-réceptices), others only when the person affected is told about them (actes réceptices). See **J. Martin de la Moutte, L’Acte Juridique Unilatéral [1951 p. 189, para. 197]**: ‘l’acte réceptice atteint donc sa perfection lorsque la manifestation parvient à la connaissance du destinataire...”*

*It is however significant that in their analysis their lordships found that the employee did not receive the notice of the termination of his contract of employment beyond the time limit of 7 days due to any fault on his part indicating that they were alive to the fact that there are instances where the delivery of the letter of dismissal could not be effected due as a result of the employee’s fault.*

*In the case of **North Island Investments Ltd. v. K.M.Valamootoo [2010 SCJ 226]** the Supreme Court referred to the same book referred by their lordships in the case of Mauvilac, that is J. Martin de la Moutte, L’Acte juridique unilateral, but at paragraph 203 and the Court pointed out that:*

*“...the learned author quoted above further evokes at paragraph 203 of L’Acte Juridique Unilatéral instances of how the destinataire of the letter of dismissal may try purposely to evade taking cognizance of l’acte unilateral informing him of his dismissal.*



Such conduct on the part of the destinataire would not operate to defeat the employer's rights where the destinataire is shown to have been **en faute**.

There is, therefore, ample limitation placed in the application of the seven day time limit prescribed under section 32(1)(b)(ii)(A) in order to prevent any of its wrongful evasion or abusive use by an employee."

There was no specific procedure laid down as to how an employee is to be notified of the termination of his contract of employment. A verbal notification is as valid as one in writing but it has been stated that a registered letter with an advice of delivery serves as a means of proof. As reported in **Précis Dalloz, Droit du Travail, J. Pelissier, G. Auzero and E. Dockes, 26e édition, note 421, p. 462:**

Conformément à la jurisprudence la notification du licenciement par lettre recommandée avec accusé de réception n'est qu'un moyen légal de preuve pour prévenir toute contestation sur le point de départ du délai-congé; doit être cassé le jugement ayant accordé l'indemnité pour inobservation de la procédure: Soc. 20 juin 1979, D.1980.91; Soc. 3 mai 1979, Bull. civ., n o 273; 26 oct. 1979, Bull. civ. V, no 592, Soc. 20 oct. 1983, Jur. soc. 1983, SJ 256. La jurisprudence admet que la notification puisse également être faite par exploit d'huissier ou par lettre remise en main propre.

### Analysis

We therefore note that there is a difference in the stand taken by the Assemblée Plénière and that of the Privy Council so that this court is bound to adopt the conception travailliste. It is significant however that in 2013 the Legislator intervened and amended **Section 38 (6) of the Employment Rights Act 2008 by Act 6 of 2013** which came into force on 11 June 2013 (Proclamation 28 of 2013).

The new Section 38 (6) now provides that

(a) A notification of a charge, a notice to answer the charge and a notification of a termination of agreement, under subsections (2) and (3), to a worker shall be issued by —

(i) causing the notification or notice to be handed over to the worker in person; or

(ii) sending the notification or notice by registered post to the usual or last known place of residence of the worker.

(b) Where a worker —

(i) refuses to accept delivery of the notification or notice; or

(ii) fails to take delivery of the notification or notice after being notified that it awaits him at a specified post office, the notification or notice shall be deemed to have been duly served on the worker on the day he refuses to accept delivery thereof or is notified that it awaits him at the specified post office.

*It is undeniable that the defendant has made a number of attempts to have the letter of dismissal delivered to the plaintiff. For instance plaintiff's wife who works for the defendant was contacted but she refused to take delivery of the letter. A copy of the letter was sent and faxed to Mr. Pyneandee who represented the plaintiff before the disciplinary committee, although the latter testified that he did not receive same, and a copy of the letter (Doc. B and L1) was even provided to the St. Pierre Labour Office. However being an acte receptice, hence ad personam, a letter of dismissal should not be delivered to another person to be handed over to the employee.*

*It follows that the present case occurred in 2010, well before the amendment brought to Section 38(6) of the ERA in June 2013 so that the law applicable is that as authoritatively decided by the Privy Council in the case of **Mauvilac** (supra) and burden lies on the defendant, the employer, to establish that the employee was “**en faute**” in case he was unable to notify the employee of his unilateral decision to terminate the latter's employment not later than 7 days after the completion of the hearing of the disciplinary committee.*

*There is evidence that the defendant took a decision only 3 days after the disciplinary committee. It caused the termination letter to be registered with advice of delivery to be delivered to the address of the plaintiff, that is “Route Cimetièrre, Ripailles, St. Pierre” (Doc. K and K1) which is the plaintiff's very address mentioned in the heading of the prœcipe. There is evidence that the letter could not be delivered but that the postal services caused a Notice of arrival of Registered letter (Doc. J) to be deposited at the plaintiff's address on 26 May 2010. The plaintiff did not take delivery of the letter and a second attempt for delivery was made on 1 June 2010 without success so that the letter was returned to the Defendant.*

*I find it pertinent, at this juncture to refer to a similar situation, which arose in France in 1990, at a time when the unilateral termination of the employment was still considered to be an acte receptice. The **Chambre Sociale of the Cour de cassation, Cass. Soc., 23 juill. 1990, no 80-60.233** held the following:*

*Mais attendu[...] qu'après avoir énoncé que [X] avait été convoqué à un entretien préalable à son licenciement par lettre recommandée envoyée [...] à l'adresse qu'il avait lui-même indiquée à son employeur et **qu'il avait été avisé de la présentation de cette lettre par La Poste**..., le juge du fond en a déduit exactement que la convocation avait été régulière **puisqu'il ne peut dépendre du destinataire d'une lettre d'empêcher, par son refus de la recevoir ou par sa négligence, le déroulement normal de la procédure.**[...]*

*In addition to the above the defendant caused a driver one Mr. Sivarajen Cathan, to hand deliver the letter to the plaintiff on two occasions, on 25 itself at 15:00 hrs. and 18:00 hrs. On both occasions the plaintiff could not be met with and the relatives found on site refused to take delivery of the letter. In addition both the HR manager, Mrs. Fanchette and the Plant manager proceeded to the plaintiff's place of residence in*

*person on 26 May 2010 but the plaintiff could not be met with so that Mrs. Fanchette had to report the matter to the police on the same day at 13:00 hrs as a pre-measure.*

*The plaintiff was suspended from duty on 06 May 2010 (Doc. D) so that there was a mise a pied conservatoire. It is trite law that during such suspension the employee is not under the obligation to provide work but that all the obligations accessoires du contrat de travail remain, for example the need to be at the disposal of his employer during working hours. In return the employee who has been suspended from duty continues to derive remuneration, as provided by the then Section 38(6)(a) of the ERA 2008 (now Section 38 (7)(a) following the amendment by Act 6 of 2013). The reason why the plaintiff has to be at the disposal of his employer during working hours is that at any time the employer may reconsider his position and asked (sic) the employee to resume work. It is to be noted that the defendant had tried to reach the plaintiff at different times of the day: 15:00 hrs and 18:00 hrs on Tuesday 25 May 2010 and before 13:00 hrs on Wednesday 26 May 2010. It is extraordinary that the plaintiff could not be met at his place of residence in spite of the number of attempts made by the defendant two different days and at different times of the day. There is no evidence that the plaintiff had informed his employer that he would not be at his place although he must have been aware that a decision would have to be taken after he had been heard by the disciplinary committee. He was obviously not at the disposal of his employer during the day on two weekdays, which is in breach of his obligations. The conduct of the plaintiff leads to the inescapable inference that the plaintiff was deliberately and wrongfully evading the service of the letter in contradistinction with the defendant's conduct who had done what it could to attempt to reach the plaintiff in person. I cannot but conclude that the plaintiff did make an abusive use of the time limit prescribed by law and it cannot be said, in the circumstances of the present case, that the plaintiff was not en faute for not receiving his letter of dismissal not later than 7 days after the hearing."*

It is humbly suggested that the above judgment is still very relevant in relation to the new provisions of the Workers' Rights Act on the issue of notification of termination of an agreement. In the present case, in the light of the various attempts made by the Respondent to contact the Complainant by phone calls, phone messages, visits at the place of residence of Complainant at Rue des Mares, Mahebourg (it was confirmed following the second visit that the relevant officers did indeed go to the place of residence of the Complainant) and the sending of the termination letter by registered post on 20 August 2024 to the residential address of the Complainant (which letter was indeed eventually received), the Tribunal has no hesitation in finding that the Respondent did what it could to attempt to reach the Complainant in person to remit the termination letter within the timeframe provided by section 64(2)(a)(v) of the Workers' Rights Act. The Complainant confirmed that he was told by the post office that there was already a first post office notification and that the one he used to fetch the letter was only a second notification. There is absolutely no evidence from the Complainant as to the fate of that first notification except that he would not have

received it. The Complainant stated that he wrote on the advice of receipt the following words: “receive first notice” (Doc L) when he had already been informed by the post office on 27 August 2024 that this relates to a second notification (and not a first notification). The Tribunal finds this piece of evidence to be very telling. In the light of all the evidence on record including the answers given by the Complainant when asked if he had informed the Respondent that he had lost his mobile phone or if he had provided an alternate phone number where he may be contacted and the unexplained fate of the first post office notification, the Tribunal has no hesitation in finding that the Respondent did what it could to notify the Complainant of the termination of his employment within 7 days after the latter had answered the charge made against him. It was the Complainant who failed to take delivery of the notification of termination of his employment after he was informed by the first post office notification on 21 August 2024 (Doc L). Thus, the Tribunal is satisfied on a balance of probabilities that the termination of employment of the Complainant was effected not later than 7 days after the latter had answered the charges made against him.

For all the reasons given above (and notwithstanding that the termination of employment was not in breach of section 64(2)(a)(v) of the Workers’ Rights Act), the Tribunal finds that the Complainant has proved on a balance of probabilities that the claim for reinstatement is justified. However, bearing in mind the nature of the duties performed by the Complainant who was a ‘Chef de Partie’ and who necessarily has to work in a team, the hot kitchen where he was working and where food was prepared for various airlines with all the exigencies which such a service necessarily requires, the efforts which the Respondent had to put in simply to be able to reach Complainant during his suspension, and more generally to ensure good employment relations within the Respondent, the Tribunal after careful consideration finds that the relationship between the Respondent and the Complainant has irretrievably been broken. The Tribunal thus orders that the Complainant be paid severance allowance at the rate specified in section 70(1) of the Workers' Rights Act.

**(SD)Indiren Sivaramen**

**Acting President**

**(SD)Bhawantee Ramdoss**

**Member**

**(SD)Kirsley E. Bagwan**

**Member**

**(SD)Ghianeswar Gokhool**

**Member**

**10 December 2024**