REDUNDANCY BOARD

RB/RN/154/2020

ORDER

Before:	Rashid Hossen	-	President
	Amrita Imrith (Mrs.)	-	Member
	Abdool Feroze Acharauz	-	Member
	Chandrani Devi Gopaul (Ms.)	-	Member
	Saveeta Deerpaul (Ms.)	-	Member

In the matter of: -

ISWARDUTH BOODHUN

AND

MEDINE LTD

On 10th September 2020, Mr. Iswarduth Boodhun (hereinafter referred to as the "Applicant") sought for an Order directing his employer (hereinafter referred to as the "Respondent") to pay to him severance allowance at the rate specified in Section 70(1) of the Workers' Rights Act 2019 (as amended).

The application is made under Section 72(8) of the Workers' Rights Act 2019 pursuant to an alleged breach of Section 72(1A) of the Act coupled with Section 3 of the Workers' Rights (Prescribed Period) Regulations 2020 (GN 183 of 2020).

Mr. S. Mohamed, of Counsel assisted by Miss A. Dhunnoo, of Counsel appeared for the Applicant. Mr. M. Sauzier, SC, Mr. P De Spéville, SC, Miss E. De Spéville and Mr. V. Hardy, of Counsel appeared for the Respondent.

In his Statement of Case, the Applicant averred the following: -

- *He joined the Respondent as Contracts Manager on a full-time basis on 15th April 2011.*
- *The Respondent is engaged inter-alia in the Development of building projects for sale (Land Promoter and Property developer).*

- *His duties consisted in ensuring the management and coordination of consultants to meet the client brief from concept stage up till tender stage and thereafter to monitor the construction team together with all the contractors and other stakeholders. He also had to ensure that procurement is done in time and target dates are met. He was involved in facilities management and fit out works for building and service works, procurement of items within a tendering process and contract management. He advised clients on strategic decisions and prepared feasibility studies with financial aspects and valuations for decisions making. He was involved in the liaison with the various authorities in conjunction with project development requirements. He was also involved in the cost control and value engineering of projects and ensured that works implemented are within the client budget.*

- *On 7th July 2016, a Senior Manager was employed and applicant's job title changed to Project Manager. His scope of works remained unchanged as per his previous job title and he was also involved in construction management works together with project management. He has been involved in construction of schools, office parks theatres, shopping mall, residences, sports center, parcelling of lands, fitting out buildings, construction of luxury villas and a filling station.*

- *As Project Manager, he was earning a monthly salary of Rs 145, 655.*

- *On 3rd June 2020, at around 10 30 a.m., he was convened by the Assistant HR Manager of the Respondent, Mrs. Priscille Rose, to attend a meeting with the upper management to discuss some issues regarding his employment. The following persons were present at the meeting:*
    - *Mr. Hubert Harel* - *Managing Director*
    - *Mr. Laurent Gordon Gentil* - *HR Manager*
    - *Mr. Marc Desmarais* - *Managing Director – Shared Services*
    - *Mrs. Priscille Rose* - *Assistant to HR Manager*
    - *Mr. Ian Koenig* - *Head of Property*

- *During the first meeting, the Respondent imparted to Applicant that it was undergoing a restructuring of its staff due to economic reasons, and as a result, he had been made redundant.*

- *Respondent's Managing Director – Shared Services, Mr. Desmarais, told him that the trend now is to go to the Redundancy Board where he will get only a maximum of 1 month of his salary prior to him leaving the company. However, the Respondent was willing to negotiate and work out a compensation package.*

- *He was given a letter of redundancy dated 3rd June 2020.*

- *Contrary to what was indicated in the letter of redundancy, he was given about an hour to think and then he was called back again to the meeting.*

- *Respondent proposed to him an amount of 2 weeks' salary per year of service to which he did not agree. He asked for 3 months' salary per year of service which the Respondent refused.*

- *Respondent then left him with two alternatives, either to accept one month per year of service upon being made redundant or, as per Mr. Desmarais, to go before the Redundancy Board where he would receive only one month salary.*

- *Respondent also compelled him to accept their offer on that day itself or he would be left with no other alternative.*

- *He was left with no other option than to accept the Respondent's offer of one month's salary per year of service. The Respondent's HR Manager, Mr. Gordon Gentil, then handed to him another letter dated 3rd June 2020 titled "Agreement for Termination: Iswarduth Boodhun".*

- *At the material time, he was under considerable pressure inasmuch as on 27th May 2020, a specialist doctor confirmed the presence of 3 glands in his neck and thyroid which he was told could be carcinogenic. His wife and 2 school children financially depend on him completely.*

- *Respondent was aware of his health condition inasmuch as on 28th May 2020, he had imparted same to Mr. Ian Koenig who was his superior in his reporting line and who was also present in the meeting of the 3rd June 2020.*

- *Respondent informed him that his last day of work would be on 5th June 2020.*

- *On 8th June 2020, Respondent and himself entered into and signed a document entitled "Transaction" wherein it was inter alia agreed that his contract of employment was terminated for economic reasons on 5th June 2020 and he was paid a sum of Rs 1, 527, 964 made up as follows:*
    i. *Payment of severance allowance representing 1 month basic salary per year of service (inclusive of the employee's end of year bonus (prorated) and the payment of the local leaves balance);*
    ii. *Payment of 1 month notice.*

- *The document entitled "Transaction" was signed by Mr. Laurent Gordon on behalf of the Respondent and himself.*

- *He is advised and verily believe that the document entitled "Transaction" dated 8th June 2020 does not comply with the requirements of Section 16 of the Workers' Rights Act.*

- *Respondent terminated his employment and compelled him to enter into a compromise agreement which is to all intents and purposes null and void during the prescribed period as provided for under Section 72(1A) of the Workers' Rights Act coupled with Section 3 of Workers' Rights (Prescribed Period) Regulations 2020 (GN 183 of 2020).*

- *He is advised and verily believe that pursuant to Section 72(8) of the Workers' Rights Act, he is therefore entitled to the full amount of severance allowance as provided for under Section 70(1) of the Workers' Rights Act.*

- *He consequently prays from the Board for an Order directing the Respondent to pay to him the sum of Rs 8, 737, 534. 42 representing the shortfall in severance allowance as per the rate specified in Section 70(1) of the Workers' Rights Act computed as follows:*

1.	*Severance allowance Rs 265, 003 x 3 months x (9 years 1 month and 20 days)*	*Rs 7, 265, 498. 42* -
2.	*Less Amount paid on 8th June 2020*	*Rs 1, 527, 964. 00*
3.	*Shortfall in severance allowance*	*Rs 5, 737, 534. 42*

- *He also prays for any Order as the Board may deem fit in the circumstances.*

In its Statement of Reply, the Respondent raised the following preliminary objections:-

- *Applicant is bound by a Transaction signed by the parties on 8th June 2020 which has "l'autorité de la chose jugée en dernier ressort" and cannot be challenged before the Redundancy Board inasmuch as:*
    a. *only the competent court has the jurisdiction to nullify such Transaction; and*
    b. *the provisions of section 16 of the Workers' Rights Act do not apply to the Applicant, who is not a worker as defined under Section 2 of the Act.*

- *Application is based on Section 72(1A) of the Workers' Rights Act 2019 amended by the Finance (Miscellaneous Provisions Act) 2020 which was enacted on 7th August 2020 and which Section 72(1A) took effect as from 7th August 2020 whereas the Transaction reached by the parties' date back to 8th June 2020.*

- *The Redundancy Board does not have jurisdiction to hear a dispute after an agreement has been reached in compliance with the provisions of Section 72 of the Workers' Rights Act.*

The Respondent averred that:

- *It is Médine Property which is a department of the Respondent which is engaged inter alia in the Development of building projects for sale (Land Promoter and Property Developer).*

- *The purpose of the meeting was to inform the Applicant of a restructuring exercise which would involve all the entities within Médine Group of Companies.*

- *The Respondent explained to the Applicant that it was undergoing a restructuring exercise due to economic reasons. At the said meeting, the Applicant was informed that there was a possibility that his post be made redundant.*

    – *Respondent explained to the Applicant the difficult operating conditions which the Group was facing and the decision to undergo a restructuring exercise which would involve all the entities within Médine Group of Companies.*

- *Applicant was informed of the intention of the Respondent to reduce its workforce on a permanent basis and that there was a possibility that his post be made redundant.*

- *Respondent explained the procedure for a reduction of workforce under Section 72 of the Workers' Rights Act.*

- *Respondent stated to the Applicant that the parties could either negotiate and agree on a payment of a compensation by way of settlement or should no agreement be reached; the Respondent would have to apply to the Redundancy Board.*

- *Respondent also stated that in the event the Respondent seizes the Redundancy Board, there were two possible outcomes: either (i) the Redundancy Board finds the redundancy justified and the Employee receives one month notice or (ii) the Redundancy Board finds the redundancy unjustified and the Employee is awarded 3 months remuneration per year of service.*

- *By letter dated 3rd June 2020, the Applicant was recommended to elect a workers' representative to start negotiations with the Respondent.*

- *Applicant and all the employees concerned with the redundancy exercise went along the negotiation route.*

- *All employees involved in the redundancy plan were given reasonable time to think it through and to decide whether they wanted to negotiate or not.*

- *All concerned employees were recommended to elect a workers' representative to start negotiations with the Respondent but chose to negotiate individually.*

- *All concerned employees were even invited to consult family members, and/or (a) a representative of the Ministry of Labour or (b) a legal adviser of their choice.*

- *During the negotiations, Respondent informed the Applicant that the Respondent was not in a position to offer more than one month salary per year of service.*

- *Applicant was not the only person concerned with the redundancy.*

- *Applicant expressed his agreement to accept a compensation on the basis of one month salary per year of service.*

- *Respondent remitted the letter dated 3rd June 2020 to the Applicant.*

- *A transaction was signed between the parties on 8th June 2020.*

- *Given the medical tests that the Applicant was undergoing, the Respondent accepted to keep the Applicant and members of his family under the Respondent's medical insurance scheme for 3 additional months after termination of employment.*

- *In or about mid July 2020, Applicant called Mr. Koenig and informed him that the tests carried out produced negative results and he was relieved of same.*

- *Given that the Applicant earned a monthly salary of Rs 145, 655, he was not a worker within the meaning of Section 2 of the Workers' Rights Act;*

- *The Transaction dated 8th June 2020, reached between the parties is valid and has "l'autorité de la chose jugée en dernier ressort" and cannot be questioned before the Redundancy Board.*

- *The present application cannot be entertained by the Redundancy Board as the Transaction dated 8th June 2020 was reached under the prevailing provisions of Section 72 of the Workers' Rights Act.*

- *The application is based on Section 72(1A) of the Workers' Rights Act 2019 amended by the Finance (Miscellaneous Provisions) Act 2020 which was enacted on 7th August 2020 and which Section 72(1A) took effect as from 7th August 2020, whereas the Transaction reached between the parties dates back to 8th June 2020.*

- *Under Section 124 of the Workers' Rights Act, the Minister may make such regulations for the purposes of the Act.*

- *The Workers' Rights (Prescribed Period) Regulations 2020 was passed on 14th August 2020 setting the prescribed period for Section 72(1A) Workers' Rights Act as "the period starting on 1 June 2020 and ending on 31 December 2020".*

- *On 1st June 2020, the Section 72(1A) of the Act did not exist and came into force only on 7th August 2020.*

- *It was not open to the Minister to make regulations that would give retroactive effect to Section 72(1A) of the Act, which was inexistent when the Transaction dated 8th June 2020 was concluded.*

- *Section 72(1A) of the Workers' Rights Act does not apply to the Transaction dated 8th June 2020 between the Respondent and the Applicant.*

- *Respondent is not indebted to the Applicant in the sum claimed or in any other sum/s whatsoever.*

- *Respondent therefore moves that the present application be dismissed.*

The Applicant deponed to the effect that he was appointed as Project Manager by the Respondent and his task consisted of setting up feasibility budgetary preparations on new projects and submit them to the Respondent. He worked in a team consisting of architects and engineers, amongst others. After going through the tender procedures, he continued to oversee

the projects up to the end. In July 2016, some changes were brought to his job title with no consequences to the scope of work. On 3rd of June 2020 at around 10 30 hours, Mrs. Priscille Rose, the Assistant Human Resource Manager asked the applicant to come to a meeting where one Mr. Marc Desmarais was present. In presence of Mr. Laurent Gordon Gentil, Mr. Desmarais stated to applicant that the company is encountering economic difficulties and needs restructuring and that the applicant post would be declared redundant. He was given a choice of either being put before the Redundancy Board or he was to deal with the company directly. He was given one hour to decide. Since 25 May 2020, he had been receiving necessary treatment for cancer. Taking into account his poor health whereby he was expected to undergo a surgery and being the only breadwinner to his parents, wife and children, he proceeded negotiating with the Respondent. After turning down an offer of two weeks per year of service, he eventually accepted an offer of one month salary per year of service. Applicant stated that he was pressurised by Respondent to come to that agreement. His last day at work was the 5th June 2020 and on the 8th of June 2020, he signed an agreement under the title "Transaction". Sometime in September 2020, he learnt that an amendment had been brought to the law whereby an employer is not to terminate the employment contract of an employee during the period 1st of June to 31st December 2020. He complained to the Ministry of labour, Human Resource Development and Training, accordingly.

The Respondent's witness Mr. Laurent Gordon Gentil, confirmed that Applicant was asked to attend a meeting on 3rd June 2020 at around 10 30 hours. Management convened five persons including Applicant. The witness remitted the letter of redundancy to Applicant while explaining that the company is going through financial difficulties and a restructuration was called for Applicant's post to be made redundant. According to the company's representative, the Applicant was given a choice to elect a worker's representative to negotiate or he could negotiate directly with the company. Applicant amongst others was given some time to consider and he could call his relatives, the Ministry of Labour or a lawyer. The witness was aware of Applicant's ill health but at no time was he told by the Applicant that the latter was not comfortable to proceed with the negotiation. An offer of two weeks per year of service was made by Mr. Desmarais to the Applicant. The option offered was either to go before the Redundancy Board or to negotiate directly with the company. Applicant chose to negotiate directly and he accepted an offer of one month pay per year of service. The agreement was confirmed in a "Transaction" dated 08th June 2020. He received a cheque that was cashed on the same day. There were two meetings, the first one on the 3rd June 2020. The witness added that Applicant could not be offered any other post as none was available.

Mr. P. D. de Spéville, SC strenuously submitted that the amendment brought to the existing law with regard to forbidding employers to terminate employees' contract of employment during the period from 1st June to 31st December 2020 is an ex post facto law. It is considered to be unconstitutional and therefore the Board does not have jurisdiction to entertain the present matter. He cited a number of authorities which according to his submission supports his contention. Counsel also submitted lengthily on the "Transaction" that took place between the parties on the 8th June 2020 to the effect that such agreement cannot now be challenged. He contended that in the present matter there was a potential "situation

litigieuse" followed by discussions and negotiations. The "Transaction" is as valid as a judgment and it can only be rescinded on specific grounds. It was up to the Applicant to do so before the proper forum.

Mr. S. Mohamed's main submission is that the amendment to the law which has a retroactive effect brings the present matter to a situation where Respondent should not have brought to an end the employment contract. Furthermore, the amendment makes no mention of an agreement or a "Transaction" to be an exception with regard to its retroactive effect. Counsel further submitted that it is not for the Board to decide on issues of validity of the law. He also submitted after quoting the current law in France that a letter of termination cannot include a clause of a "Transaction" as that would render the "Transaction" null and void.

We respectfully disagree with Mr. S. Mohamed's submission that the Respondent ought not to have terminated the employment contract of the Applicant given the amendment brought to the Workers' Rights Act 2019, in particular Act 20 of 2019, gazetted on 21st August 2019 coupled with the Workers' Rights (Prescribed Period) Regulations 2020, GN No. 183 of 2020. The prohibition to reduce the number of workers or terminate the employment of any worker does not cover any termination of employment contract by agreement. It would be awkward if not absurd if a worker wishes to leave an enterprise and he is legally prevented to do so. Reduction of workforce in the Workers' Rights Act 2019 is initially a unilateral decision by the employer. Any accord or assent of the worker regarding termination of his employment contract would fall out from the application of the prohibition regulation.

Counsel also submitted on the French Code du Travail. True it is that the substance of our labour law finds its origin in France. However, the codified French labour law regarding the procedure emanating from the termination of a contract of employment has no application to our jurisdiction.

With regard to the issue of retrospective legislation, we find it fitting to quote **1. Mr. R. d'Unienville 2. Mrs. Olga d'Unienville v. Mauritius Commercial Bank in the presence of 1. Director, Mauritius Revenue Authority 2. The Ministry of Finance (SCJ 2013 404)**:

> *"...**Retrospective legislation***
>
> *Under section 45(1) of the Constitution, Parliament in Mauritius is vested with the power to make laws subject to the Constitution. The Courts are not expected to examine the merits or demerits of a policy laid down in an enactment by the legislature. The only test is the Constitutional yardstick. The exercise by Parliament of its legislative power to make laws is subject to **section 2 of the Constitution** which provides the following:*
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> *"The Constitution is the supreme law of Mauritius and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void".*
>
> *A law enacted by Parliament can thus only be struck down to the extent that it infringes any of the provisions of the Constitution, including fundamental rights, or*

otherwise goes against any restriction or limitation by the Constitution. Parliament however is expressly empowered by ***Section 46(4) of the Constitution*** *to make laws which may be enforceable not only prospectively but also with retrospective effect.* ***Section 46(4)*** *reads as follows:*

> *"(4) No law made by Parliament shall come into operation until it has been published in the Gazette but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect."*

There is a Constitutional limitation to this exercise of legislative power with retrospective effect. Parliament, cannot validly enact retrospective criminal or penal legislation: nullum crimen sine lege. ***Section 10(4) of the Constitution*** *prohibits the enactment of any new criminal offence or any increase in penalty with retrospective effect:*

> *"4. No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed…*

…The general principle however, is that every legislation is prima facie prospective: lex prospicit non respicit (law looks forward not back). The European Court of Human Rights in Aguardino SRL v. Moldova 7359/06 – 27 September 2011, in considering the retrospective effect of tax legislation, lays stress on how it may adversely impinge on the respect for the rule of law and damage legal certainty and legitimate expectations. The European Court also pointed out that legislation may not be used retrospectively or retroactively to subvert a final judicial decision…

*…**In Naujeer v. Registrar of Civil Status and Ministère Public (1991 MR 117)**, the Court analysed the impact of the law-making powers of Parliament under section 45 and 46(4) of the Constitution in respect of the retrospective application of a law and in the light of the provisions of section 17 of the Interpretation and General Clauses Act. Although, section 17(3)(c) of the Interpretation and General Clauses Act, is not per se a constitutional provision which limits the legislature's power to enact retrospective laws, the provisions of sections 3 and 8 of the Constitution would afford constitutional protection against a legislation which may operate to deprive a person of his property by interfering with rights which have accrued to him in accordance with section 17(3)(c), where such interference would contravene either section 3 or section 8 of the Constitution. The Court had this to say:*

> *"The provisions of our law regarding the retrospective effect of statutes are contained in sections 45 and 46(4) of the Constitution. These lay down that Parliament may make laws with retrospective effect but also that Parliament may, subject to the other provisions of the Constitution, make laws for the peace, order and good government of Mauritius. Quite clearly, just as Parliament cannot legislate to deprive someone of his property except by complying with section 3 which guarantee to our citizens the protection of the law. It is in amplification of this that section*

17 of the Interpretation and General Clauses Act lays down that a repeal of an enactment shall not take away a right acquired under the previous law…

…In ***Secretary of State for Energy and Climate Change v. Friends of the Earth & Ors (2012) EWCA Civ 28 (para. 45 & 46)*** *the Court drew a distinction between retroactive and retrospective changes to explain that the presumption against interference with vested rights is stronger with regard to retroactive changes as opposed to retrospective changes:*

> *"45. Lord Rodger drew a distinction between the retroactive operation of legislation and prospective changes to existing rights. Retroactive changes change the law in relation to events which have taken place in the past (187). Retrospective changes alter existing rights, but only in relation to the future. The presumption against altering vested rights in the future is weaker than in relation to retroactive change (195)."*
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> *Although it is weaker, there remains a presumption against the alteration of existing "vested rights", that is, those rights which, once acquired, fairness demands should not be altered. Such rights are described by Lord Herschell in Abott v. Minister for Lands (1895) AC 425 at 431, as those of which a beneficiary has availed himself before the law is changed (196)."*

We will not make any pronouncement neither on the constitutional point nor on the Minister's power to introduce a retroactive law. These should be canvassed before the appropriate forum following the appropriate procedure.

Sections 83 and 84 of the Constitution make provision for reference of constitutional points: -

> ***83. Original jurisdiction of Supreme Court in constitution questions***
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> *(1) Subject to sections 41(5), 64(5) and 101(1), where any person alleges that any provision of this Constitution (other than Chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for a declaration and for relief under this section.*
>
> *(2) The Supreme Court shall have jurisdiction, in any application made by any person in pursuance of subsection (1) or in any other proceedings lawfully brought before the court, to determine whether any provision of this Constitution (other than Chapter II) has been contravened and to make a declaration accordingly:*
>
> *Provided that the Supreme Court shall not make a declaration in pursuance of the jurisdiction conferred by this subsection unless it is satisfied that the interests of the person by whom the application under subsection (1) is made or, in the case of other proceedings before the court, a party to these proceedings, are being or are likely to be affected.*
>
> *(3) Where the Supreme Court makes a declaration in pursuance of subsection (2) that any provision of the Constitution has been contravened and the person by whom the*

application under subsection (1) was made or, in the case of other proceedings before the court, the party in those proceedings in respect of whom declaration is made, seeks relief, the Supreme Court may grant to that person such remedy, being a remedy available against any person in any proceedings in the Supreme Court under any law for the time being in force in Mauritius, as the court considers appropriate.

(4) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred on it by this section (including rules with respect to the time within which applications shall be made under subsection (1)).

(5) Nothing in this section shall confer jurisdiction on the Supreme Court to hear or determine any such question as is referred to in section 37 or paragraph 2(5), 3(2) or 4(4) of the First Schedule otherwise than upon an application made in accordance with that section or that paragraph, as the case may be. (Amended 48/91).

84. Reference of constitutional questions to Supreme Court

(1) Where any question as to the interpretation of this Constitution arises in any court of law established for Mauritius (other than the Court of Appeal, the Supreme Court or a court martial) and the court is of opinion that the question involves a substantial question of law, the court shall refer the question to the Supreme Court.

(2) Where any question is referred to the Supreme Court in pursuance of this section, the Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, where the decision is the subject of an appeal to the Court of Appeal or the Judicial Committee, in accordance with the decision of the Court of Appeal or, as the case may be, of the Judicial Committee. (Amended 48/91).

Notwithstanding its power to exercise judicial function, the Board finds no necessity for the application of section 84 of the Constitution. Counsel for the Respondent conceded during his submission that the retroactive law has not caused any prejudice to his client in the present matter although there may be a potential prejudice. The Board created by statute and whose function is judicial, is not mandated neither to decide on constitutional issues nor to invalidate any law, be it regulations made by the Minister. *"The ordinary courts are appropriate for the decision of purely legal rights… the question in issue is not of purely legal rights but a conflict between private and public interests bound up in a greater or lesser degree with ministerial policy as outlined by statute."* **(Constitutional and Administrative Law, Fifth Edition, O. Hood Phillips at page 497)**.

The bone of contention in the present matter remains the circumstances in which the "transaction" was effected. This written document signed by both parties clearly stipulates at paragraph E of its preamble *"The parties have now decided to record the agreement reached by way of "transaction" pursuant to Article 2044 et seq. of the Civil Code, especially, Article 2052 which provides that "transaction" have "l'autorité de la chose jugée en dernier ressort".*

"… *'Transaction' are governed by the stipulations of Article 2044 to 2058 of the Civil Code. Those articles had given rise to quite a lot of controversy in French Legal and judicial circles. It appears however that both "doctrine" and the "jurisprudence" have now somewhat clarified the whole question.*

Article 2044 of the Civil Code reads as follows: -

"La transaction est un contrat par lequel les parties terminent une contestation née, ou préviennent une contestation à naître. »

In the encyclopédie de Droit Civil, Dalloz: Vo. Transaction – we read the following: -

"5. Selon la majorité de la doctrine, trois éléments sont nécessaires à l'existence d'une transaction :

1. Une situation litigieuse
2. L'intention des parties d'y mettre fin
3. *Des concessions réciproque consenties dans ce dessin... »*

*(*as reproduced in **S. Thanacoody v. New Dairy Co Ltd 1973 SCJ 4).**

In ACMS Ltd v. Mark Clive Biencowe 2014 SCJ 112, the Supreme Court referred to an article written by Patrick Chauvel, agrégé des Facultés de droit, an ex-professor at the University of Auvergne, *"…on 'transaction', the author expatiates on the fact that for the agreement or undertaking of a party to constitute a valid 'transaction', three essential elements should be present; as stated by me above when referring to* ***Encyclopédie Dalloz****. On the first element, Professor Chauvel wrote the following:*

> ***Note 13****: Situation litigieuse – La nécessité d'une situation litigieuse, contestation née ou a naitre, résulte de la définition même de la transaction donnée par l'article 2044 de code civil : le contrat par lequel les parties terminent ou préviennent une contestation.*
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> ***Note 14****: Difficulté contentieuse ou simple incertitude ? – Il convient de noter que cette conception se différencie de celle retenue par le droit romain. Le terme de transaction recouvre alors, non seulement le contrat mettant fin à un litige, mais encore toute convention par laquelle* ***les*** *parties entendent éliminer une incertitude existant dans leurs relations juridiques, même s'il n'existe entre elles aucune difficulté contentieuse ».*
>
> *On the second element, the Professor wrote at note 60 that:*
>
> *L'intention des parties de mettre fin à un litige – ou de le prévenir – est parfois présentée comme le troisième élément nécessaire a la* ***qualification*** *du contrat de transaction. Quoique la question se soit rarement posée en jurisprudence, elle est d'importance capital, car il est bien certain que si cette intention fait défaut, l'accord intervenu entre les parties n'est pas une transaction ».*
>
> *On the third element the following is what the Professor has noted:*
>
> *Le mot concession implique, de la part de celui qui y consent, une* ***renonciation*** *a une partie de ce qu'il prétend être son droit. Néanmoins, on peut donner à la proposition un sens positif et admettre, a titre de concession, une prestation extérieure au litige, la*

souscription d'une obligation nouvelle. Cette possibilité est conforme au sens originaire de la notion ».

Article 2052 of the Code Civil provides:

"Les transactions ont entre les parties, l'autorité de la chose jugée en dernier ressort ».

Elles ne peuvent être attaquées pour cause d'erreur de droit, ni pour cause de lésion ».

Applicant was made aware during the first meeting he had with management of the details of the agreement reached between himself and management (Document E). He was to receive one month basic salary per year of service. Applicant granted to respondent *"full and absolute discharge in relation to any claim that you had or may have in relation to your past employment and the termination thereof, you confirm that you have no further claim or representation to make to Medine Ltd, its Directors, employees or proposes and hereby irrevocably makes any claim or representation that you had or may have".* "The "transaction" was duly signed on the 8th June 2020 allowing Applicant ample time to manifest a change of heart, if any. He did not take much time to cash his cheque as it was done on the very day he received it. His concern was more to meet the expenses of his surgery. Furthermore, his claim for more money only started in September when he learnt about the amendment to the law. We fail to understand how he could invoke being pressurised upon signing the "transaction" when he kept silent about it for a long time. His action was geared towards having another bite at the cake. It has not been denied by the company's representative that Mr. Desmarais imparted to Applicant that he would get only one month pay at the Redundancy Board. The Applicant whose post is described as "Contracts Manager" and who works on setting up feasibility budgetary preparations seemed to have accepted whatever Mr. Desmarais was throwing at him. He is to be blamed for his own gullibility and cannot now invoke any "dol" or compulsion to nullify the "transaction". It was up to him not to be duped by any misrepresentation or lie of Mr. Desmarais regarding the Redundancy Board which has power to order also severance allowance up to three months per year of service.

We find it suitable to refer to what the Law Lords stated in **Leymunlall Nandrame and others (Appellants) v. Lomas Ramsaran (Respondent) (Mauritius), (2015 UKPC 20)**, *"This conclusion follows even without considering the impact on the case of the Civil Code. Article 2044 of the Code defines as "la transaction" a contract to bring to an end either existing or contemplated litigation. Article 2052 provides that such a transaction has, as between the parties, "l'autorité de la chose jugée en dernier ressort ». Articles 2052 and 2053 limit the basis on which such a transaction can be challenged to errors as to the identity of parties or the subject matter of the dispute, or fraud or violence. The Board has not needed to hear detailed submissions on the precise meaning of these expressions, which did not form the basis of the decision of the Supreme Court, but it may well be that they have an effect similar to that to which the common law leads".*

In the present matter there was a *litige* between the parties, they entered into negotiations and finally they reached an agreement putting an end to the *litige* and both parties made reciprocal concessions and as pointed out in ***Dalloz, Répertoire de droit civil, v° Transaction, notes 11:*** *Dans le cas de la transaction judiciaire (contestation née), celle-ci met toujours fin au procès, quelque soit le moment où elle intervient.* Hence the aim of such a compromise is not only to end an actual *litige* but also to prevent any future and pending litigation through reciprocal concessions.

There has been *transaction* which becomes the law of the parties, in compliance with art.1134 of the Civil Code: ***Dalloz, Répertoire de droit civil,v° Transaction, notes 415.*** It is significant that the cause of action of the plaintiff is not one of the defendant's non-compliance with the terms of the agreement reached out but one of making additional claims consequential to the agreement and now claiming more than what had been agreed upon to be full and final satisfaction of his claim.

It is not denied that all receivables were duly received and were duly paid out to the applicant. By asking for more than was jointly agreed the applicant is, in effect, challenging the finality of the agreement; and incidentally dealing anew with the *litige* which is tantamount to an abuse of process: **Devendranath Hurnam v. Kailashing Bholah and Soobashing Bholah [2020] UKPC 12, PRV 120.** An agreement made in full and final satisfaction cannot form the basis of a cause of action for additional claims. We are comforted in that view from the following extracts from ***Dalloz, Répertoire de droit civil,v° Transaction, Chap 7: effets, Section 3, notes 447,448.***

447. On s'accorde, aujourd'hui à reconnaître que la transaction est simplement déclarative. ***Elle ne crée ni ne transfère aucun droit; elle éteint seulement le droit d'agir en justice*** *qui existait pour faire reconnaître les prétentions des parties, auxquelles, précisément, il a été renoncé. En cela, elle consacre des droits préexistants. Mais la transaction n'est pas, ce faisant, un acte récognitif : ni l'un ni l'autre des contractants ne reconnaît le bien-fondé de la demande de l'autre.*

448. Parce que la transaction ne crée ni ne transfère aucun droit sur la chose litigieuse, ***elle n'a, en principe aucun effet novatoire. Les créances et les dettes reconnues par la transaction ne naissent pas de celle-ci et acquièrent pas une nature juridique nouvelle****. Ce sont les créances et les dettes qui existaient antérieurement entre les parties. La transaction les a confortés, en les mettant à l'abri de la contestation.*

We find it apposite to quote extensively from **Dalloz, Répertoire de droit civil, v° Transaction, notes 429 and 431** which read as follows:

429. *C'est par son effet extinctif que la transaction s'apparente le plus à une décision judiciaire. Dans un cas comme dans l'autre, il est mis fin au litige par l'épuisement du droit d'action des parties. Ainsi, si un procès venait à renaître malgré la transaction, le défendeur disposerait d'une exception péremptoire, l'exceptio litis finitae per transactionem, semblable à l'exceptio litis finitae per rem judicatam. C'est ce qu'exprime l'alinéa 1er de l'article 2052 de code civil : «Les transactions ont entre les parties l'autorité de la chose jugé en dernier ressort »*

431. La transaction met fin à la contestation en éteignant l'action en justice relative au droit litigieux. L'effet extinctif se manifestera donc par l'exception de transaction qui s'opposera, le cas échéant, à ce que le procès soit, selon le cas, engagé, continué ou repris… "

For the above reasons, the Board finds that the parties had entered into a *transaction* thereby putting an end to the dispute between them.

The application for severance allowance is accordingly rejected.

(SD)

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Rashid Hossen

(President)

(SD)

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Mrs. Amrita Imrith

(Member)

(SD)

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Abdool Feroze Acharauz

(Member)

(SD)

……

Ms. Chandrani Devi Gopaul

(Member)

(SD)

……

Ms. Saveeta Deerpaul

(Member)

Date: **29 October 2020**