REDUNDANCY BOARD
ORDER

RB/RN/157/2020

Before:	**Bernard C. Marie**	**-Vice-President**
	Amrita Imrith	**-Member**
	Chandrani Devi Gopaul	**-Member**
	Suraj Ray	**-Member**

In the matter of: -

Pravin BOODHNA

v.

Harel Mallac Technologies Ltd

On the 25th of September 2020, Mr. Pravin BOODHNA, an ERP Consultant, hereinafter referred to as the "Applicant", applied to the Redundancy Board, hereinafter referred to as the "Board", under Section 72(8) of the Workers' Rights Act 2019 (as amended), for an order directing Harel Mallac Technologies Ltd, hereinafter referred to as the "Respondent" to reinstate him in his previous post.

Background

(1) *On 25th of September 2020, the Applicant applied to the Board, (the application was followed by a statement of case dated 8th October 2020), under Section 72 of the Workers' Rights Act 2019 (as amended), for an order directing the Respondent to reinstate him in his previous post.*

(2) *On 1st of October 2020, both parties were convened to a preliminary meeting before the Board. The Respondent was represented by Messrs. Jean Francois Couve, Ashwin Gopaul and Joy Godadhur. The Applicant was in attendance. Both parties were not assisted by Counsel. The case was fixed on the 9th of October 2020 for the parties to retain services of Counsel.*

(3) *On 9th of October 2020, the Applicant who was in attendance was assisted by Mr. Ashwin Goodaye, a trade unionist and member of the General Workers Federation. The Respondent was absent but was assisted by Counsel. The Applicant filed in his Statement of Case and upon a request of Counsel appearing for the Respondent, the matter was postponed to the 19th of October 2020, for the Respondent to file its Statement of Reply.*

(4) *On the 19th of October 2020, both parties were in attendance. Counsel appearing for the Respondent informed the Board that the Respondent is not ready with its Statement of Reply and that same will be completed and be filed before the*

hearing stage. The Board proceeded to fix the matter for hearing on the 28th of October 2020.

On the day of hearing, the Applicant was assisted by Mr. Ashvin Gudday, trade unionist, member of the General Workers Federation. The Respondent was represented by its Human Resource Manager, Mr. Couve and was assisted by Counsel.

The Applicant's Statement of Case

The Applicant averred in his Statement of Case that:

"1. The applicant has been an employee of respondent from 14 October 2019 to 10 July 2020.

2. Being on a Permanent contract, the applicant claims that the respondent failed to set up a proper disciplinary committee and on the 10th June the applicant was given his termination letter which he considers is a breach of Workers Rights Act section 64 (6) (a) which stipulate that an employee should be given the opportunity to answer any charge related to alleged poor performance made against him. Furthermore, s64 (7) the applicant should have been given the opportunity to be assisted by a representative of Trade Union, a Lawyer or an Officer of the Ministry.

3. The applicant was put before a "fait accompli", in breach of his rights and the law. The applicant wish to draw the attention of the Redundancy Board that he was not agreeable with the terms and conditions of the termination of his employment (as discussed in the HR meeting held in the HR office on the 10th June 2020). In such case, the respondent had duty to notify the Redundancy Board as per WRS s72 (5) whereby no agreement was reached under s72 (3) or (4).

4. Applicant also wish to highlight the following important aspects:

- *Applicant does not have offshore expertise nor any knowledge of the Fundcount system which the Respondent claim that the former failed to implement.*
- *No training was provided by employer of the Fundcount system to the employee prior to the implementation of the System. Therefore, it is absurb to conclude that the Employee failed to implement the system.*
- *The concerns highlighted in the "Letter of Concern" for not confirming the employee during Probation are factually incorrect/unfounded.*
- *No job description was provided by the Employer to the Employee before or during this employment period.*
- *The services of Consultant (Daniel Romburgh) was not solicited for the implementation of the Fundcount system. The issue was raised as a major concern for not confirming Pravin Boodhna.*

In view of the above, by way of this application the applicant humbly pray for an order of the Redundancy Board directing the Employer to reinstate the Employee in his former employment with payment of remuneration from the date of termination of the employment to the date of his reinstatement or in the alternative, any order as the Board may deem appropriate."

The Respondent's Statement of Reply

The Respondent averred in its Statement of Reply that:

> *"THE ISSUE BEFORE THE BOARD*
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> *MR. PRAVIN BOODHNA (hereinafter referred to as the "employee") is praying the Redundancy Board (hereinafter referred to as the "Board") for: -*
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> *A. An order directing HAREL MALLAC TECHNOLOGIES LTD (hereinafter referred to as the "employer") to reinstate him in his former employment with payment of remuneration from the date of termination of the employment to the date of reinstatement; or in the alternative*
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> *B. Any order as the Board may deem appropriate.*
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> *BACKGROUND OF THE CASE*
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> *1. On the 14th of October 2019, the employee took employment with the employer as ERP CONSULTANT. The employee's contract of employment contained, at Clause 14 thereof, a probation clause, which read as follows: -*
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> *"The Employee shall be on probation for six months. Upon satisfactory completion of his probation period, the Employee shall be confirmed in his position. Notwithstanding Clause 15, if the Employee has not completed his probation period satisfactorily, the notice shall be 14 days in writing." (Emphasis Added)*
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> *2. The employee's probation period ended on the 10th of April 2020, and his performance was appraised by his immediate superiors in the presence of the Human Resources & Talent Manager. The employee's performance, following the aforesaid appraisal, was rated as being "below expectations" and the employer could not, in the circumstances, confirm the employee's position.*
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> *3. It was however decided to extend the employee's probation by thirty (30) days with a view to giving him "the opportunity to improve your performance from below expectation." An e-mail to that effect, dated 10th April 2020, was sent by the employer to the employee.*
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> *4. On the 11th of May 2020, the employee's performance was again assessed and it was decided to extend the employee's probation for a further period of thirty (30) days.*
>
> *5. At the end of the thirty (30) days' period mentioned in the preceding paragraph, i.e. on the 09th of June 2020, the employer assessed the employee's performance and it was noted that the employee was showing "no signs of improvement".*
>
> *6. The employer therefore decided not to confirm the employee's position, because despite being given two (2) opportunities to improve his performance, the employee has failed to do so.*

7. The employee was consequently, by letter dated the 10th of June 2020, informed of the employer's decision and given notice, in accordance with the provisions of Clause 14 of his employment contract, reproduced at paragraph 1 above.

8. The employee reported the matter to the MINISTRY OF LABOUR, INDUSTRIAL RELATIONS, EMPLOYMENT AND TRAINING and the employee attended two meetings with the officers of the CONCILIATION AND MEDIATION SECTION of the aforesaid Ministry.

9. The employee then filled a dispute before the COMMISSION FOR CONCILIATION 7 MEDIATION and the employer attended a sitting of the said Commission but no decision was taken against the employer.

THE LEGAL PROVISIONS

10. The employee has based his action before the Board on section 72 (8) of the WORKERS' RIGHTS ACT (hereinafter referred to as the "WRA"), which provides that: -

Subject to subsections (5) and (7), where a worker claims reinstatement, he may apply to the Board for an order directing his employer to reinstate him in his former employment with payment of remuneration from the date of the termination of his employment to the date of hid reinstatement.

11. Section 73 (1) of the WRA provides that: -

There shall be a Redundancy Board which shall deal with all cases of reduction of workforce and closure of enterprise for economic, financial, structural, technological or any other similar reasons. (Emphasis added)

THE CASE FOR THE EMPLOYER

IN LIMINE LITIS

12. The employer is advised and verily believes that the Board has no jurisdiction to hear and/or determine the present matter because: -

a. The facts mentioned at paragraphs 1 to 6 above which show that the employee has failed to complete his probation period to the employer's satisfaction;

b. The Employer has not applied, nor does it intend to make any application to the Board in accordance with the provisions of section 72 of the WRA with a view to reducing "the number of workers in his employment, either temporarily or permanently, or close down his enterprise";

c. The employee has not averred, in his application before the Board, that his employment has been terminated as a result of the employer reducing "the number of workers in his employment either temporarily or permanently" in breach of the provisions of the WRA.

d. The employee has, on the other hand, stated in his application that: -

i. "... the Respondent failed to set up a proper disciplinary committee ..."; and

ii. "... an employee should be given the opportunity to answer any charge related to poor performance made against him."

e. The employee is therefore confirming that his alleged dispute before the Board is based on his non-confirmation to his post of ERP CONSULTANT for reasons pertaining to his unsatisfactory performance during his probation period, and clearly not for "economic, financial, structural, technological or any other similar reasons".

13. And for all other reasons to be given in due course.

14. The employer will therefore submit to the Board that the employee has been wrongly advised to enter the present dispute, which should consequently be set aside."

Evidence of the Applicant

The Applicant deposed to the effect that: -

He was employed as ERP consultant at Harel Mallac Technologies. On the 10th of June 2020, after confinement, he was called for an appraisal in the HR office where the departmental manager and the human resource manager were present. He stated that they went through certain aspects of his job and he was told that he had a poor performance at work to which he was not agreeable to. A few days later, he was informed that his employment has been terminated and he was given one month notice for the time spent in employment with the Respondent. He was neither informed nor given the opportunity to be assisted by someone during the appraisal and the reason given for termination of employment was poor performance. He said that he did not agree with the reason given in a letter dated 14th April 2020 by the HR manager, that he was recruited to implement a new system but he apparently could not do so and that the Respondent had to hire an external consultant for the same job. He maintained that his application to the Board is based on the fact that he was unjustifiably dismissed on grounds of poor performance and no disciplinary committee was set up prior to the termination of his employment. In **cross examination,** he stated that he was employed on the 14th October 2019 and confirmed that according to paragraph 14 of the contract of employment he was employed on a probation basis of six months subject to good performance. He agreed that there was an appraisal on the 14th of April 2020 where Mr. Couve, Mrs. Minoushka Jankee and Mr. Hejaz Auckburally were present but he denied that Mrs. Gina Dalayya was present and that they concluded that his performance was below expectations. He acknowledged having signed a letter whereby it was clearly stated that his probation period was extended for a further period of one month. He agreed that on the 11th of May 2020, there was another

appraisal and that the probation period was extended for another month. He acknowledged that a further assessment of his performance had been conducted on the 9th of June 2020. After the assessment, the Respondent decided to put an end to the probation period and he was not hired for the post. However, he denied that they concluded that he has shown no progress in regard to his performance. He further explained that he did not receive any negative remarks with respect to his performance. He agreed that he was asked to conduct a presentation but denied that he was not well versed in the new software and that the presentation was "catastrophique". He explained that he had done many presentations in the past and had trained many colleagues and clients but he acknowledged that he had some problems on that day of the presentation when he had to insert some figures. He further agreed that he had been working for less than a year. He admitted his application is not based on termination of his employment on grounds of economic, financial, structural, technological or similar reasons and he did not have information to sustain same. In **re-examination**, he explained that his application is based on unjustified termination on grounds of poor performance, but he denied that he poorly performed and he further requested to be reinstated in his post because of lack of negotiation which is a breach of section 72(5) and also due to the fact that no disciplinary committee was set up by the Respondent.

Evidence on behalf of the Respondent

Mr. Jean Francois Couve, HR and Talent manager, witness for the Respondent, deponed as follows: - He identified and produced:

(i) The Applicant's contract of employment (Document A);

(ii) 1st extension of probation period letter dated 14th April 2020 (Document B);

(iii) 2nd extension of probation period letter dated 14th May 2020 (Document C);

(iv) Termination letter dated 10th June 2020.

In **cross-examination**, he said that he worked on facts given to him by the Management Team and the facts were in relation to the poor performance of an employee. He further stated that the consultant as mentioned previously by the Applicant is in fact a client's consultant called Mr. Dain. He testified that the Applicant was employed on the basis of his qualifications. He has a BSc, a Master in Business Administration and an ACCA qualification. The Applicant was given an opportunity to prove himself on the Fundcount project which he failed and he was again given an opportunity to prove himself on another project called ERP but again failed despite the fact that he was hired for that post. He also stated that the issue about having difficulties in implementing a project and that he needed assistance was only raised by the Applicant 5 days after CEO was informed by a client. It is only when one of our clients addressed his complaint to our CEO, who sent a letter to the General Manager, who in turn forwarded

same to the Senior Manager and the issue was raised with the Applicant, that the Respondent became aware that the Applicant had some problems implementing the project and that he needed assistance. He testified that the Applicant should have raised the alarm 5 days before and asked for assistance. He further stated that there was no need for a disciplinary committee since it was not an act of misconduct but poor performance on the part of the Applicant. The Respondent regularly conducts performance review on an employee who is on probation before deciding to confirm the employee to his post. In **re-examination,** the witness recapped that the non-confirmation of the Application was for poor performance and not for economic reasons.

Submission of Counsel appearing on behalf of the Respondent

Counsel submitted that:

> *"Mr. President in light of the deposition of the applicant in the present matter, I am taking the point in law which has been raised in the Statement of Reply, I shall refer Mr. Vice President to Section 73(1) of the Workers' Rights Act, which sets up the present board, it states clearly" There shall be a Redundancy Board which shall deal with all cases of reduction of workforce and closure of enterprises for economic, financial, structural, technological or any other similar reasons." We have clearly heard the applicant and we are clearly not .....and his application clearly does not fall in the ambit of the law. Mr. Boodhna has clearly stated that he agreed that his post was not confirmed for reasons pertaining to his performance. He stated on several occasions that he was not given opportunity to answer a charge. It was a performance appraisal which he could not meet the required level. I have produce the contract of employment which clearly provides for a probation period and so clearly we are not in that purview of the law that is economic, financial, structural, and technological, so therefore, I am submitting that the application is not founded and therefore should be set aside in the present matter."*

Submission of Counsel appearing on behalf of the Applicant

Counsel stated that:

> *"Yes Mr. Vice President, so on our part, we wish to say that we applied before the Redundancy Board under Section 72 A because the applicant felt that he was unfairly dismissed from his job based on poor performance which he feels under Section 64 6A and 7. He was not given a fair chance to represent himself to be assisted. We can understand the point that as Mr. Saminaden said the case is irrelevant based on Section 73 of the Workers' Rights Act. It's his interpretation because on our part we feel that according to Workers' Rights Act Section 72 sub section 5, in any case for us, the termination of Mr. Boodhna is a sort of redundancy, so he was not given a*

chance to explore, to negotiate to find any sort of solution if he could have been redeployed or he could have been given appropriate training for him for further more implement his duties as required, in that perspective we have full faith in the Redundancy Board and rely on the wisdom of the Vice President to direct the employer to reinstate Mr. Boodhna back to his job with immediate effect. Thank you Mr. Vice President"

ANALYSIS

Section 72(1A) (a) of the Workers' Rights Act 2019 (as amended) provides as follows:

> *"Subject to paragraph (b), an employer shall, during such period as may be prescribed, not reduce the number of workers in his employment either temporarily or permanently or terminate the employment of any of his workers."* (The prescribed period as provided in the Workers' Rights (Prescribed Period) Regulations 2020 covers the period starting on the 1 June 2020 and ending on 31 December 2020).

And a breach of Section 72(1A) (a) of the Workers' Rights Ac 2019 (as amended) by an employer, enables a worker to seize the Board for redress under Section 72(8) of the said Act which provides that:

> *"Where the employment of a worker is terminated in breach of subsection (1), (1A), (5) or (6), the worker may apply to the Board for an order directing his employer – (a) to reinstate him in his former employment with payment of remuneration from the date of the termination of his employment to the date of his reinstatement; or (b) to pay him severance allowance at the rate specified in section 70(1), and the Board may make such order as provided for in subsection (10) or (11)."*

Before the Board explores any issue/s with respect to Section 72 of the Workers' Rights Act 2019 (as amended), it has to determine whether it is entitled above all to entertain an application for termination of employment on grounds of poor performance.

Jurisdictional aspect

Redundancy Board was established with restricted jurisdiction and the purpose of which was detailed in Section 73 of the Workers' Rights Act 2019(as amended) where it is stated that:

"There shall be a Redundancy Board which shall deal with all cases of reduction of workforce and closure of enterprises for economic, financial, structural, technological or any other similar reasons."

In contrast, industrial matters which fall outside the Board's ambit would be dealt with before the Industrial Court which was set up with wider powers under Section 3 of Industrial Court Act 1973. The Industrial Court was established ***"....with exclusive civil and criminal jurisdiction to try any matter arising out of the enactments set out in the First Schedule or of any regulations made under those enactments and with such other jurisdiction as may be conferred upon it by any other enactment"***. (underlining is ours)

A useful distinction between *"licenciement pour motif personnel"* and *"licenciement pour motif économique"* can be found in **"Jurisclasseur Travail" a "Fascicule" on "LICENCIEMENT POUR MOTIF ÉCONOMIQUE":**

"64. – Modification du contrat de travail ou suppression d'emploi pour un motif économique – *Le motif économique se définit comme un motif non inhérent à la personne du salarié (C. trav., art. L. 1233-3). Distinguer un motif personnel d'un motif économique (ou plutôt non inhérent à la personne) n'est pas toujours chose aisée. Selon une jurisprudence classique mais souvent méconnue par les employeurs, « la rupture résultant du refus par le salarié d'une modification de son contrat de travail, proposée par l'employeur pour un motif non inhérent à sa personne, constitue un licenciement pour motif économique » (Cass. soc., 9 oct. 1991 : Bull. civ. V, n° 399. – Cass. soc., 14 mai 1997 : Bull. civ. V, n° 177, mutation d'un salarié qui n'avait pas un caractère disciplinaire mais résultait d'un sureffectif et répondait ainsi à un « besoin de l'entreprise ». – Cass. soc., 6 avr. 2011 : Dr. soc. 2011, p. 803, note H.-K. Gaba : « recherchant la véritable cause du licenciement, la cour d'appel a retenu que le salarié n'avait pas été licencié à cause de son comportement mais en raison de son refus d'accepter la modification du contrat de travail ». – Cass. soc., 28 mai 2019, n° 17-17.929 : JurisData n° 2019-009011 ; JCP S 2019, 1221, note S. Rioche).La logique est donc binaire : sauf disposition légale particulière, un licenciement repose sur un motif inhérent ou sur un motif non inhérent à la personne, et le second est nécessairement un motif économique que l'employeur doit donc justifier en prouvant l'une des causes économiques énumérées à l'article L. 1233-3 du Code du travail (difficultés économiques, etc.). (underlining is ours)*

It is quite apparent from a reading of Section 73 of the Workers' Rights Act 2019(as amended) that the Board is vested with restricted powers to deal with only matters relating to *"licenciement pour motif économique"* whereas the Industrial Court is vested with wider powers to deal with matters in regards to both *"licenciement pour motif personnel"* and *"licenciement pour motif économique".*

This approach has repeatedly been adopted in Courts as well as in Tribunals. In **Nestlés Products (Mtius) Ltd v Dabysingh (1988) SCJ 423**, the Court held that:

> *"Sections 31 and 32 (repealed Labour Act 1975) refer to termination of agreements by the employer generally, that is to say what Camerlynck calls "licenciement individuel". It does not however affect section 39 which refers to the reduction of work force by an employer in the special case where an employer has a labour force exceeding ten workers, and where the same learned author refers to as "licenciement économique"".*

Similar distinction was made in **Simla Douraka and Ors v. Medical and Surgical Centre Ltd (Welkin Hospital) (ERT/EPPD/RN 01/18)**, the Tribunal stated the following:

> *"In the present matter, it has been observed that the issue of the Complainants' performance was raised on several occasions by the Respondent. It has notably been contended that Ms Douraka and Ms Makoondlall were no longer performing and that regular meetings were held with them to solve their issues and help them; that Mrs Jang had nothing to do and was assigned ad hoc tasks; that Mr Al-Janabi was not doing his work properly in relation to the conversation rate and a letter dated 30 June 2017 was sent to him regarding his work; and that Mr Veerabadren was neither performing as Head of Stores or as Procurement Executive when MSCL took over the hospital. The Tribunal notes that these issues relate mainly to the job performance of the Complainants and are not directly concerned with the process of redundancy per se, which was based on economic and structural reasons as stated in the Notice dated 26 September 2017. It would thus be appropriate to note what was stated by Dr D. Fok Kan (supra), p. 390, in relation to dismissals for economic and structural reasons:*
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> *Contrairement aux autres motifs de licenciement, ceux examinés ici se rapportent à un motif non inhérent à la personne de l'employé licencié. Aucune faute ne lui est en effet reprochée, son licenciement est dû à une suppression de son poste pour des motifs "economic, technological, structural or of a similar nature". Emphase est ainsi mise sur "la suppression de*

poste : lorsque le salarié licencié est remplacé à son poste de travail, on voit bien que le motif du licenciement tenait à sa personne ; en revanche, si le licenciement s'accompagne de la suppression du poste, c'est le signe que la personne du salarié n'était pas directement en cause". La Cour Suprême en reprenant cette distinction dans l'arrêt Nestlés Products (Mtius) Ltd v Dabysingh confirme cette analyse. "

In the matter of **Impact Production Ltd (RB/RN/18/20)**, the Board after thorough analysis of the employer's notification, rightly so, cleared the confusion with respect to protection against termination of employment contrary to Section 64 and reduction of workforce and closure of enterprise under Section 72 of the Workers' Rights Act 2019(as amended), when it stated that:

"We do not follow that reasoning when subsection (2) of the Workers' Rights Act 2019 deals essentially and exclusively with termination of employment that takes place otherwise than for economic, financial, structural or similar reason. It is in relation to an issue that is personal to the employee as opposed to a situation where he is not to be blamed at all"

The Board observes that the Applicant's statement of case is unambiguous and reveals a clear absence of termination of employment on any one of the grounds specified in Section 73 of the Workers' Rights Act 2019(as amended). The Board also notes that during the hearing, the Applicant on numerous occasions made reference to termination of employment on grounds of poor performance only, which unquestionably falls outside the jurisdiction of the Board.

The version of the Applicant in regards to termination of employment on grounds of poor performance is also supported by the letter dated 10th of June 2020 (document D), addressed by the Respondent to the Applicant, coupled with the version of the Respondent's witness, to the effect that the former was not confirmed to the position of ERP consultant based on the ground that his performance at work was below expectation of an ERP consultant.

In the present case, it seems that the Applicant has committed the same mistake when he seized the Board for redress. In the alternative, his recourse for termination of employment for reasons related to poor performance contrary to Section 64(6) of the said Act, if any, should have been directed to the Industrial Court. However, before the Applicant attempts to do so, his mind should first be settled in regards to whether it is a fit case of termination of employment which justifies a claim before the

Industrial Court or only a mere non-confirmation to the post of ERP Consultant, which is without remedy.

Hence, based on the above observations, together with the fact that the Applicant was unable to prove on a balance of probabilities that his employment was terminated contrary to Section 72(1A) (a) of the Workers' Rights Act 2019 (as amended), the Board without much difficulty concludes that there is enough evidence on record to sustain the Respondent's case that this application was not entered before the proper forum.

The Board therefore orders that the application be set aside.

(SD)

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Bernard C. MARIE
(Vice-President)

(SD)

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Ms Chandrani Devi Gopaul
(Member)

(SD)

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Mrs Amrita Imrith
(Member)

(SD)

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Mr Suraj Ray
(Member)

3rd December 2020