REDUNDANCY BOARD
ORDER

RB/RN/153/2020

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

In the matter of: -

Vishwaraj BUNGSHEE

v.

Iloa Ltd

On the 11th of September 2020, Mr. Vishwaraj BUNGSHEE, a Housekeeping Supervisor, hereinafter referred to as the "Applicant", applied to the Redundancy Board, hereinafter referred to as the "Board", for an order directing Iloa Ltd, hereinafter referred to as the "Respondent" to pay him severance allowance at the rate specified in Section 70(1) of the Workers' Rights Act 2019 (as amended), on the ground that the Respondent has closed its enterprise without following procedures laid down in Section 72 of the Workers' Rights Act 2019 (as amended).

Background

(1) *On 11th of September 2020, the Applicant applied to the Board (the application and the statement of case in one single document) for an order directing the Respondent to pay him severance allowance for breach of Section 72 of the Workers' Rights Act 2019 (as amended).*

(2) *On 17th of September 2020, both parties were convened to a preliminary meeting before the Board. The Respondent was represented by Mrs. Domingue and was assisted by Counsel. The Applicant attended but was not assisted by Counsel. The case was fixed on the 22nd of September 2020 for the Respondent to file statement of reply and for the Applicant to retain services of Counsel.*

(3) *On 22nd of September 2020, the Respondent filed in its statement of reply together with a preliminary objection. In a letter dated 21st of September 2020, the Board was informed by Counsel appearing for the Applicant that the latter has exceptionally requested for a postponement as his father passed away on*

September 18th. There being no objection from the Respondent, the case was postponed for mention on the 29th of September 2020.

(4) On the 29th of September 2020, both parties were in attendance and were assisted by their respective Counsel. Counsel appearing for the Respondent moved to amend the latter's statement of reply by adding a new Preliminary Objection. The matter was fixed for hearing on the 15th of October 2020. In a correspondence addressed to the Board, on the 13th of October 2020, the new Preliminary Objection was subsequently withdrawn by Counsel appearing for the Respondent.

On the day of hearing, both parties were in attendance and were assisted by their respective Counsel.

The Applicant's Statement of Case

The Applicant averred in his Statement of Case that:

"1. Applicant appeared before the Redundancy Board on 25 August 2020 in a matter referred to it by the Respondent regarding the reduction of its workforce and on that day the case was set aside.

2. As at 10 September 2020, Respondent has not called nor written to the applicant to resume duty.

3. Applicant has further not been paid his wage for the month August 2020 as at 11 September 2020.

4. Respondent has closed down its enterprise and has failed to comply with the procedures laid down in Section of the Workers' Rights Act 2019.

5. Applicant worked as Housekeeping Supervisor since 1st September 2016 and was last drawing Rs. 16, 260 per month as basic wage.

6. Applicant avers that by the acts and doings of the Respondent and having failed to notify the Redundancy Board of its intention to close down the enterprise, the termination of his employment is deemed to be an unjustified one.

7. Applicant is, therefore, praying the Redundancy Board for an order directing Respondent to pay him severance allowance at the rate of 3 months per year of service and 30 days' wages as indemnity in lieu of notice."

The Respondent's Statement of Reply

The Respondent averred in its Statement of reply that:
"

1. *The Applicant has filed a Statement of Case dated 11 September 2020, to which the Respondent wishes to reply by way of the present Statement of Case in Reply.*

PRELIMINARY OBJECTION

"The Redundancy Board does not have jurisdiction to hear the present application as the Respondent is not an employer employing not less than 15 workers in an undertaking or an undertaking having an annual turnover of at least 25 million rupees, under section 72(2) of the Workers' Rights Act. The present application should therefore be dismissed."

REPLY ON THE MERITS

2. *The Respondent admits paragraph 1 of the Applicant's Statement of Case. Furthermore, the Respondent wishes to draw the attention of the Board to the fact that the previous notification dated 25 June 2020 was lodged in conformity with section 72 of the Workers' Rights Act 2019 ('WRA'), and especially section 72(5) WRA, but was withdrawn following a change in the legislation, which came into force on 14 August 2020, which prevents an Employer from reducing the number of its workers between 1 June and 31 December 2020, without first reducing for one of the financial assistance schemes provided by law (Regulations GN 123/2020 enacted pursuant to section 72(1A) WRA).*

3. *The Respondent admits paragraph 2 of the Applicant's Statement of Case and avers that the Respondent's activities consist in managing properties on behalf of clients, in exchange of which payments are made to the Respondent. This is the main source of revenue and business activities of the Respondent. Since the start of the pandemic, property owners have terminated the management contracts with the Respondent, such that there is currently no work to be performed by the Applicant, which explains why he was not called to resume duty.*

4. *The Respondent admits paragraph 3 of the Applicant's Statement of Case and avers that the Respondent will pay the Applicant's wage as and when the Respondent will have the cash flow to do so.*

5. *The Respondent strongly denies paragraph 4 of the Applicant's Statement of Case. The Respondent avers that the Respondent has not closed down. Its activities have decreased considerably and there is no work to perform, but it has not closed down its enterprise. Therefore, the Applicant cannot argue that the Respondent has failed to follow the procedures laid out in section 72 of the Workers' Rights Act 2019 ('WRA') in relation to closing down of an enterprise since the enterprise has not closed down. In any case as already stated the Respondent does not fall under section 72 of WRA.*

6. *The Respondent admits paragraph 5 of the Applicant's Statement of Case.*

7. *The Respondent denies paragraph 6 of the Applicant's Statement of Case and reiterates paragraph 6 above.*

8. *The Respondent denies paragraph 7 of the Applicant's Statement of Case and reiterates paragraph 6 above. The Respondent further avers that the Applicant cannot seek*

payment of severance allowance under section 72(8) of the Workers' Rights Act because his employment has not been terminated and is still employed by the Respondent."

Evidence of the Applicant

Mr. Vishwaraj Bungshee deponed to the effect that: -

He was employed as Housekeeping Supervisor at Iloa Ltd for 4 years and was earning a monthly salary of around Rs. 22,000/- including overtime. On the 25th of June 2020, the Respondent had notified the Board of its intention to reduce its workforce and at some point, the notification was withdrawn by the Respondent and he was told that he is still in employment. He stated that he has not been paid his monthly salary for the months of August and September 2020. He was neither requested over the phone nor in writing to resume duty. He maintained that the Respondent has not closed down its enterprise. He testified that he applied to the Board on the 11th of September 2020 for an order for the payment of severance allowance. **In cross-examination,** the Applicant stated that he is aware that the Respondent is in financial difficulty because of lack of activities right now due to the Covid-19 but it has not closed down. He agreed that as at 11th of September 2020, all his colleagues have left and he is the only one still in employment. He further agreed that he has not been paid his salary because of the financial situation of the Respondent and conceded that he is still in employment. However, **in re-examination**, he changed his version and stated that it seems that the company has closed down, in as much as, for the past 2 months, the Respondent did not request him to resume duty.

Evidence on behalf of the Respondent

Mr. Gregory MAYER, Director of ILOA, witness for the Respondent, deponed as follows: -

He testified that he is one of the Directors of the Respondent and at present, the Applicant in the present matter is the only worker left. He claimed that there is no activity going on at the company because the border is closed and due to lack of income, the Applicant is not being paid his salary. He further stated that the Applicant's employment has not been terminated and no letter was addressed to the Applicant to that effect. **In cross-examination**, the witness stated that he neither received his salary nor dividend (although he is not a shareholder) from the Respondent since last year because it was technically insolvent. He maintained that he is an employee of another company called Horizon, a different entity with different shareholders, where he is being paid at a reduced salary since 2019. He agreed that the Respondent notified the Board for reduction of workforce on the 25th of June in a previous matter, but insisted that by the end of May 2020 the company employed less than 15 workers. He explained that 4 out of 15 workers had left after Covid-19 outbreak, but before the 25th of June and he filed in 12 letters representing settlement agreements signed by the Respondent and each of those

twelve workers (Documents are marked as A1 to A12). He further stated that he is not well versed in the law and that at the time of notification he was not in position to tell whether the Board had jurisdiction in the previous matter. (Counsel appearing on behalf of the Respondent, for the purpose of the record, intervened to inform the Board that at the time of notification in the previous matter his services had not been retained). He stated that the Respondent had asked for financial Assistance Scheme but it was turned down. He explained that the Respondent is not allowed to file for insolvency during the Covid-19 period. However, He applied and benefited from the Wage Assistant Scheme to pay the workers up to the month of June 2020, up until the Respondent parted with its workers. He maintained that he did not have a copy of the application for Wage Assistance Scheme in his possession but same can be produced at a later stage. He further stated that once the company recovers financially the Applicant will be paid his salary. He said that all employees were informed of the financial situation of the Respondent. Apart from the Applicant, He even helped some 10 employees to find job elsewhere. He and Mr. Sebastien Bachs are directors of Horizon, a company which is technically insolvent and compared to the Respondent, they managed to survive financially with the help of its networks. The Respondent is not operating for the time being because our borders are closed. The Respondent is heavily indebted, has no assets and he has done everything possible to keep the company business afloat. He acknowledged that the Applicant needed to get paid as of right and the latter is still in employment. He said that the Respondent tried to reach a settlement with the Applicant but to no avail. **No reexamination.**

Submission of Counsel appearing on behalf of the Respondent

Counsel elected to submit only on the preliminary objection. He stated that:

"Firstly, the applicant himself has admitted that, at the time he has entered this application before the Board, he was the only employee. It is trite law that under Section 72, an employer means a company which has not less than fifteen workers, or an annual turnover of Rs 25M, which is not the case in this matter. Therefore, Section 72, does not apply and the application made before this Board should fall on this basis.

*Secondly, this application is made under Section 72(8). I quote, "**Where the employment of a worker is terminated in breach of Subsection (1), (1A), (5), or (6) of Section 72, the worker may apply to the Board for an order directing his employer-(b) to pay him severance allowance at the rate specified in Section 70(1)**". This is the application made before this Board as per subsection 72(8)(b) of the Workers' Rights Act. It has been established and it has been admitted by the employee that his employment has not been terminated. Not only his employment has not been terminated but it has*

certainly not been terminated in breach of Subsection (1), (1A), (5) or (6). So, those are two reasons why this application should not have been made before the Board and why the Board does not have jurisdiction in this matter. If the employee feels that failure to pay remuneration amounts to a breach of contract, he should go before the Industrial Court and claim severance allowance."

Submission in reply to submission of Counsel appearing for the Applicant

Counsel stated that:

"My friend has himself in his submissions refers to Section 61(2) of the Workers' Rights Act, and more particularly to sub ***Section 61 (2) (a), (b) and (c), (a) the worker is ill-treated by the employer, (b) the employer fails to pay the remuneration due under the agreement and (c) the employer fails to provide work and to pay remuneration under an agreement.*** *When this happens, is the board competent? Each time an employee feels ill-treated, will he come before the board?*

This Board is competent under section 78 (A) and (B) of the WRA. And my friend should have shown how the employer has terminated the employment in breach of subsection (1), (1A), (5) or (6) or section 72. This has not been shown to the Board. Secondly, and this is the most important point, I believe. My friend has not say a word as to how this Board will be competent on 11th of September 2020, when the application is lodged, whereas this company has only one employee. And there are documents. My friend has himself referred to the first list of fifteen workers, and letters have been produced where we see that twelve of those workers have resigned. So, at best there would be only three of the employees. But the Board would still not be competent under the law."

Submission of Counsel appearing on behalf of the Applicant

Counsel stated that:

"Mr. Chair, firstly, this application should not be seen in isolation, it has to be seen within the context in which the employer invoked the jurisdiction of this Board. The employer by virtue of a letter dated the 25th of June, invoked the jurisdiction of this Board, contending therein that they have got more than 15 workers and they were inviting this Board to allow so to say the reduction of workforce. When my learned friend ascertained that the law was changed, he chose to withdraw his application contending that, the employee remains an employee of the company.

Following that, when a company contends that an employee remains an employee of a company, as night follows days, it is expected that the employee will receive remuneration, pursuant to Section, i think it is 27 of the Workers' Rights Act. Yes, Section 27, payment of remuneration states that ***"Every***

employer shall pay remuneration to a worker at monthly intervals, unless the parties agree to payment at shorter intervals". When Mr. Bungshee was not called firstly to work and payment not effected, then he seized jurisdiction of the board pursuant to section 72 (8) that the board should make an order. Now, when an employer is deemed to have terminated the employment of an employee, we will assistance at Section 61 of the Workers' Rights Act, in particular, Section 61(2). Section 61(2) states as follows *"A worker may claim that his agreement has been terminated by his employer where-*

(a) the worker is ill-treated by the employer;

(b) the employer fails to pay the remuneration due under the agreement;

(c) the employer fails to provide work and to pay remuneration under an agreement; or

(d) the worker is made to resign by fraud".

D is not applicable. So this is where we fall squarely and fairly. The employer is no more in the 70's, is no more in the days when Bobby Sands had to go on a strike. We have evolved. We are bound by International Conventions, in relation to labour and to workforce, we are also bound by International Conventions which is important in our constitution in so far as Human Rights is concerned. They are burning their candles in both ends, taking advantage of the situation, keep him as an employee, don't pay him and goes on to contend that the employment has not been terminated, ill-treat him, because at the moment he is entitled to a family life under our Constitution and the International Conventions of the Human Rights, he is not earning, he does not have a job. He has a right to family life and it is Human Rights to have an employment. He has the right to work, that right is being denied. This board has all jurisdiction by virtue of the content of Section 61(a), (b) and (c). I asked the question to Mr. Bungshee, whether he considered that his employment has terminated, whether the company has closed down and he said yes and I am grateful to you Mr. Vice President, you picked upon that point and you asked him again and he said according to him, the company has closed down. He is not being paid and he has not been paid and continued not to be paid, contrary to the Section 61 of the Workers' Rights Act. Why this board is going to be left in a conundrum? Why are we going to allow the employer to take advantage of the situation to an extent that is in today's world unimaginable? Treats someone as employee but don't pay him. How is that possible? The law is very clear. Now in so far as the application in June 2020, when I asked question to Mr. Mayer, he categorically denied that there was no 15 workers. But when he counted his own documents, he counted at least 15 there and the board has noticed the demeanour of the witness when giving evidence. The manner in which he was trying to circumvent in telling the truth, in trying to be economical with the truth, in trying to tell half-truth, only but the truth. The board in my respectful submission has jurisdiction to rule upon it, to make an order, pursuant to Section 72 for severance allowance at the rate of 3 months per year and in so far as in the Wage Assistance Scheme,

other of the Ipse dixit of the witness, we don't have any document. He purports that he made an application at the State Bank of Mauritius or the Commercial Bank. He purports that he wrote to the MRA but nothing has come forward. So on balance of the probability, the case for the employee has been made out before this board today and I urge upon this board to make an order for the severance allowance to be paid to Mr. Bungshee so that he can earn his living."

<u>Proceedings</u>

The Board takes also good note of the statement of Counsel appearing for the Respondent right before cross examining the Applicant.

Counsel stated that:

> *"We have stated on the previous occasion that we have raised a point of law as to the jurisdiction of this Board, but despite the statement, it was ruled by the Board, that this matter should be heard on the merits before argument could be heard on the point of law.*
>
> *I have to state that by complying with the ruling of the Board and cross-examining this witness and possibly call a witness to give evidence, we are not submitting to the jurisdiction of this Board. Because the fact of adducing evidence and cross-examining the witness could be interpreted as submitting to the jurisdiction of the Board. We are complying with the ruling of the Board but we are still of the view that the point of law should have been heard first. So, with those precautions I am going to cross-examine the witness..... although we stated that the point of law concerns the jurisdiction of the Board, but I understand we are not before a Court of Law. Before a Court of Law where the jurisdiction of the Court is contested, of course we cannot go on the merits, the point of law should be taken first. But when I stated this on the last occasion, there was a ruling from the President to the effect that before the Board, with the constraint of time, we should take the case on the merits. So, I have to take some precautions to the effect that."*

The Board reiterates that in order not to flout the spirit of Sections 75(8) and (9) of the Workers' Rights Act 2019 (as amended) and to complete its proceedings expeditiously, the Board, by the power vested in it by Section 75(7) of the Workers' Rights Act 2019 (as amended), has invited arguments on Preliminary Objection on the very day the matter was heard on the merits.

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)."*

But before the Board delves into any issue/s with respect to Section 72 of the Workers' Rights Act 2019 (as amended), the central question in this case calls for the Board to determine whether it is entitled above all to entertain this application in accordance with the aforesaid section.

Establishment of the Redundancy Board

The Establishment of the Redundancy Board is provided by Section 73 of the Workers' Rights Act 2019(as amended) which reads as follows:

> *"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."*

Jurisdictional aspect

However, there is an important *caveat* that, in no circumstances, must be overlooked, that is the Board shall only deal with matters in accordance with Section 72(2) of the Workers' Rights Act 2019 (as amended) which defines an ***'Employer'*** as:

> *"[A] person employing not less than 15 workers in an undertaking or an undertaking having an annual turnover of at least 25 million rupees."*

Number of workers

Since the issue of jurisdiction is being contested by the Respondent, the Applicant had the burden of satisfying the Board on a balance of probabilities that the Respondent employed not less than 15 workers or had an annual turnover of at least 25 million rupees. The evidence before the Board are:

(a) The version of the Applicant, during the hearing, to the effect that the Respondent on the 25th of June 2020 employed 15 or more workers and that by 11th of September 2020, the Respondent was left with only one worker.

(b) The version of the representative of the Respondent, at hearing stage, is that before the Covid-19 period, by the end of May 2020, it employed 15 workers. A few of them left during the month of June 2020 but before the 25th of June 2020, when it notified the Board of its intention to reduce its workforce, the Respondent was left with only 10 workers.

(c) 12 letters representing settlement agreements each individually signed by those respective workers and the Respondent (Documents are marked as A1 to A12).

(d) The version of the representative of the Respondent, during cross examination, is that *"[Q]uand compagnie pena travail, ene moment donné pou bisin ferme compagnie mais banne COVID regulations ine prevent us pou ferme ça compagnie la."*

A parallel can be drawn with the case of **EDOUARD TRADING LTD. v G. TANG YAT HEE (1994) SCJ 284** where Chief Justice V.J.P. Glover and Justice A.G. Pillay had clarified the circumstances where it became compulsory for an employer to notify the Minister of its intention to reduce its number of workforce. Back then, the mandatory threshold under Section 39 of the repealed Labour Act 1975 was an employer employing more than 10 workers. The Court pointed out that:

> *"Clearly this can only refer to an intention to reduce the number of workers by actively terminating their employment, i.e. by dismissing them. It cannot refer to a situation where the employer proposes to canvass lawful means of finding alternative employment for the workers, or enabling them to do so. It follows that the obligation to notify the Minister only arises when the employer forms the intention to dismiss one or more workers. Let us assume that X who employs 12 persons decides that, for economic reasons, he can rearrange his business to make do with only 7 workers. X then calls a meeting of his employees and explains the situation; if within a week, one worker dies, another emigrates, and a third takes up employment with a sister company, it cannot then be said that X has incurred an obligation to notify the Minister as from the time he thought about the matter."*

Based on evidence at hand, the Board observes that the Respondent's initial intention to reduce its workforce on the 25th June 2020, when it seized the Board, has not faded away on its own volition. The Respondent's intention to reduce its workforce was always in motion, up until Section 72(1A) (a) of the Finance (Miscellaneous Provisions) Act 2020 came along and put the Respondent's plan on hold until the 31st of December 2020. The Board, therefore, fails to agree with the submission of Counsel appearing for the Respondent that the total number of workers must be computed at the time the Applicant applied to the Board on the 11th of September 2020 and where the Respondent had only 1 worker or at most 3 workers. The Board *a contratio* safely concludes that the total number of workers must be computed on the 25th of June 2020 and as the Respondent's plan to reduce its workforce was still underway, save and except that it was put on hold until the 31st of December 2020, the Applicant ought to be included in the batch of the 10 intended redundant workers, at most 12 workers (if based on the 2 missing letters), who were still in employment on the very day the Respondent first seized the Board.

After hearing submissions of Counsel, the Board is of the opinion that the Applicant, in the present matter, had failed to bring in evidence to establish on balance of probabilities that the Respondent either employed not less than 15 workers or had an annual turnover of at least 25 million rupees. Hence, the Board lacks jurisdiction to entertain the application and to order payment of severance allowance to be paid by the Respondent to the Applicant.

Furthermore, this conclusion makes it inappropriate for the Board to rule on the merits of this application, which is therefore set aside.

The Board, nonetheless, notes that the Respondent has agreed that it did not, as at 15th of October 2020, pay to the Applicant his monthly salary for two consecutive months and in so doing has failed to observe Section 27 of the Workers' Rights Act 2019 (as amended).

With this mind, the Applicant may claim severance allowance for termination of his employment agreement under Section 61(2) of the Workers' Rights Act 2019 (as amended) before the Industrial Court, established under Section 3 of Industrial Court Act 1973, ***"....with exclusive civil and criminal jurisdiction to try <u>any matter</u> 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)*

The Applicant may also make a complaint under Section 120 of the Workers' right Act 2019 (as amended) against the Respondent to the supervising officer of the Ministry of Labour, Human Resource Development and Training for failing to pay the remuneration due under his contract of employment. A violation of Section 123(g) of the Workers' right Act 2019 (as amended) is an offence which carries a fine not exceeding 25,000 rupees and to imprisonment for a term not exceeding 2 years.

S.D

Bernard C. MARIE
(Vice-President)

S.D

Ms Chandrani Devi Gopaul
(Member)

S.D

Mrs Amrita Imrith
(Member)

S.D

Mr Suraj Ray
(Member)

S.D

Ms Saveetah Deerpaul
(Member)

11 Nov 2020