REDUNDANCY BOARD

RB/RN/173/2020

ORDER

Before:	Rashid Hossen	-	President
	Amrita Imrith (Mrs.)	-	Member
	Saveetah Deerpaul (Ms.)	-	Member
	Chandrani Devi Gopaul (Ms.)	-	Member

Mrs. Naleenee Bissoondyal

and

Best Graphics Ltd

On 11th November 2020, Mrs. Naleenee Bissoondyal, the Applicant filed a request for severance allowance following termination of her employment contract, by Best Graphics Ltd, the Respondent in a two legged application:

(1) the company had received Wage Assistance from the Mauritius Revenue Authority and
(2) failure to notify the Redundancy Board and to obtain its approval.

Miss S. Tapsee (who conducted the case) and Mr. Y. Varma, of Counsel appeared for the Applicant. Mr. S. Murday, of Counsel appeared for the Respondent.

A Statement of Case had been filed in support of the application. The Applicant averred that she started working as Telephonist/Receptionist based on an oral contract with the Respondent as from 20th February 2002 and in or about 2013 she was promoted to the post of Accountant. The Respondent has been using the Covid-19 Pandemic as an excuse to unfairly dismiss her and the employment contract was terminated on 31st July 2020. The Applicant eventually turned down an offer of two hundred and fourteen thousand rupees (Rs 214, 000).

The Applicant feels aggrieved by the acts and doings of the Respondent in much as:

a. her dismissal has left her in a financial distress. She had contracted a loan for the education of her child and for the construction of her house and she is now unable to repay;

b. the Applicant is anguished as she was let down by Respondent after having dedicatedly worked for it for the last 18 years;

c. it is the contention of the Applicant that the Respondent unfairly chose to keep in employment another Administrative and Accounts Clerk who joined Respondent only few years ago, when priority should have been given to the Applicant given her term of service with Respondent;

d. the Applicant was not even given a chance for negotiation and the latter was only informed of her dismissal; and

e. the Applicant is of the view that only employees who are easily replaceable by seasonal/contract workers who were made redundant.

The Applicant claims that the Respondent acted in breach of Section 72 of the Workers' Rights Act on the grounds that:

a. Respondent failed to notify the Applicant of its intention to dismiss the Applicant;

b. Respondent failed to negotiate with the Applicant in relation to the terms of her dismissal;

c. Respondent failed to explore the possibility of avoiding the reduction of workforce and

d. Respondent failed to notify the Redundancy Board of its intention to reduce its workforce.

The Applicant further added that pursuant to Section 72 (1A) of the Workers' Rights Act, Respondent having benefited from financial assistance, is prohibited from reducing the number of workers in its employment either temporarily or permanently.

In reply to the Statement of Case, Respondent averred that:

- the term "accounts clerk" would seem more appropriate to the Applicant's job description.
- an attempt towards settlement was made in consultation with the Labour Office of Port Louis and proposal was made to the tune of one month's notice and 15 days per year of employment.
- the forced shutdown due to the virus pandemic has impacted on turnover.
- Respondent averred that everyone who was made redundant had accepted the fair proposal of 15 days per year of service. The Applicant is the only unreasonable employee not to have accepted the reasonable offer made in consultation with the Labour Office.
- the amount offered was corrected in consultation with the Labour Office and revised to Rs 214, 000 payable over 12 instalments. The economic situation was such that

disposing of machines is a lost cause as they are too old (the oldest machine dates back to 1950) and in bad condition.

- the Applicant was made redundant for genuine financial difficulty experienced by the Respondent.
- the economic outlook for the future of the Company was seriously called into question and a decision was made to reduce overheads to keep the Company running as opposed to a total shutdown. There was negotiation all the way with the Labour Office.
- Respondent moved for an Order for reinstatement as allowing severance allowance at the punitive rate will result in a forced closing down of the business resulting in loss of employment of the remaining 12 employees in the workforce.

The Applicant deposed to having been in the employment of Respondent since 20th February 2002. She started as Telephone Operator/Receptionist and in 2013 was promoted as Accounts Clerk. Her employment was terminated on 31st July 2020 on the ground of the Covid Pandemic. Eight employees in all were declared redundant. She was to fill a form to be put on the Workfare Programme. Following negotiation through the Ministry of Labour, Human Resource Development and Training an offer as compensation in the sum of two hundred and fourteen thousand rupees (Rs 214, 000) was made and which she rejected. She referred the matter to the present Board. She further stated that she went through a rough phase and had to apply for leave for a month. She suffered depression and insomnia. She was also affected seeing her juniors being kept in employment at the Respondent. The Applicant further believes that she is entitled to severance allowance given the fact that she was working during confinement. The severance allowance will assist her in reducing her debts. She does not agree that the Respondent business has gone down although the Covid Pandemic may have impacted on the business. During the course of proceedings before the Board the employer increased the offer to three hundred and twenty-five thousand rupees (Rs 325, 000) and same was turned down.

The Respondent's representative, Mr. Jean Bernard Chan stated that Best Graphics Ltd has been in financial difficulty since 2008. The Covid Pandemic worsened the situation. There have been more losses than profits during the last fifteen years. The company had difficulties in selling its old machines and the process of redundancy became a necessity. Those on the list were those who were not essential to the running of the business. The representative maintained that the Applicant was made aware of her redundancy prior to the termination of her contract and that the company cannot afford to increase the offer of three hundred and twenty-five thousand rupees (Rs 325, 000).

It is understood that such offer was made without prejudice in view to reaching a settlement.

Counsel for the Respondent laid emphasis on the difficult financial situation of the company and paying the full severance allowance to all employees would lead to closing down of business.

Counsel for the Applicant contended in her submission that the Respondent is going through financial difficulties. According to Counsel, the Respondent should have considered various possibilities before terminating the contract.

Section 72(8) of the Workers' Rights Act 2019 as amended reads: -

> *(8) 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).*
>
> *(Subsection (8) repealed and repealed by the Finance (Miscellaneous Provisions) Act 2020 – Act No. 7 of 2020 w.e.f 2 June 2020*

This subsection must be read in conjunction with subsections (1), (1A), (5) or (6). The latter provide: -

> *(1) Subject to subsection (1A) and section 72A, an employer who intends to reduce the number of workers in his employment, either temporarily or permanently, or close down his enterprise, shall notify and negotiate with –*
>
> *(a) the trade union, where there is a recognised trade union;*
> *(b) the trade union having a representational status, where there is no recognised trade union; or*
> *(c) the workers' representatives, elected by the workers where there is no recognised trade union or a trade union having representational status,*
>
> *to explore the possibility of avoiding the reduction of workforce or closing down by means of –*
>
> *(i) restrictions on recruitment;*

(ii) retirement of workers who are beyond the retirement age;

(iii) reduction in overtime;

(iv) shorter working hours to cover temporary fluctuations in manpower needs;

(v) providing training for other work within the same undertaking; or

(vi) redeployment of workers where the undertaking forms part of a holding company.

(Amended by the COVID-19 (Miscellaneous Provisions) Act 2020 – Act No. 1 of 2020 w.e.f 23 March 2020)

(Amended by the Finance (Miscellaneous Provisions) Act 2020 – Act No. 7 of 2020 w.e.f 7 August 2020)

(1A) (a) 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.

(b) Paragraph (a) shall not apply to –

(i) an employer specified in section 72A; or

(ii) an employer who has applied for any of the financial assistance schemes set up by the institutions listed in the Tenth Schedule for the purpose of providing financial support to an enterprise adversely affected by the consequences of the COVID-19 virus and his application has not been approved.

(c) In this subsection -

"Covid-19 virus" means the novel coronavirus (2019-nCov).

(New subsection (1A) inserted by the Finance (Miscellaneous Provisions) Act 2020 – Act No. 7 of 2020 w.e.f 7 August 2020)

(5) Where no agreement is reached under subsection (3) or (4), or where there has been no negotiation, an employer who takes a course of action as specified in subsection (1), shall give written notice to the Redundancy Board set up under section 73, together with a statement

showing cause for the reduction or closure at least 30 days before the intended reduction or closing down, as the case may be.

(6) An employer shall not reduce the number of workers in his employment either temporarily or permanently before the time specified in section 75(8) and (9).

Given that subsection (1A) above prohibits the reduction of the number of workers by an employer during a specified period which has now been extended to 30th June 2021. (Government Notice 312 of 2020), the required procedure in cases of reduction of workforce has to all intents and purposes been put on hold. Save and except in cases where an agreement has been reached in relation to termination of employment for economic, financial, structural, technological or any other similar reasons, an employer is not permitted to reduce its workforce during the prescribed period. The application of subsections (1), (5) and (6) above are therefore currently suspended. We are left with only subsection (1A). Indeed, a breach of that particular section would occur when an employer reduces or terminates the employment of a worker during the prescribed period, which in the present case is extended to 30th June 2021.

However, we see in the present application that Counsel for the Applicant has been pushing on all fronts:

- the Respondent benefited from Wage Assistance Scheme;
- Respondent failed to notify Applicant of its intention to dismiss;
- Respondent failed to negotiate with Applicant;
- Respondent failed to explore possibility of avoiding the reduction of workforce;
- Respondent failed to notify the Redundancy Board of its intention to reduce its workforce and
- Respondent failed to obtain approval from the Redundancy Board to proceed with reduction of workforce.

Counsel also submitted that the present application is further based on Section 74 of the Workers' Rights Act 2019 (as amended), in particular subsection (1A) which reads: -

74. Functions of Board

(1) The Board shall –

(a) make orders in relation to the reduction of workforce or closing down of enterprises;

Although reference is made to Section 72 (1A) of the act (supra) at paragraph 21 of Applicant's Statement of Case, it is still based on the issue of financial assistance that was granted to the Respondent. This is wholly misconceived since the obtainment of the Wage Assistance from the Mauritius Revenue Authority is not a prerequisite provision in subsection (1A) which should be strictly be adhered to.

This multi-facetted approach based on various grounds cannot be considered to be legally sustainable. It is not for the Board to surmise the basis upon which the application is grounded. An Applicant must put down the gist of what he or she is complaining about. The Board cannot infer from the facts or documents what the applicant considers to be in breach of his or her rights. An Applicant should identify the particular breach he or she is complaining of. It is not for the Board to guess what an Applicant objects to or make up the complaint for him or her.

In **IFRAMAC LTD v. THE ASSESSMENT REVIEW & ANOR - 2017 SCJ 406**, the Applicant made an appeal against the decision delivered by the Assessment Review Committee (ARC). The Committee concluded that expenses incurred in the rental of the cars by the appellant fell under Section 21(2) (c) of the VAT Act and therefore it could not be credited as input tax and was thus deductible against output tax under the VAT Act. It was held that provisions of Section 21 (c) which expressly and specifically disallow the claim for any input tax would prevail over the other general provisions within the VAT Act. The appeal was dismissed as it was based on the incorrect application of the law.

In **THE GAIA CHARITABLE FOUNDATION & ANOR v. ESTERA TRUST (MAURITIUS) LIMITED & ANOR - 2019 SCJ 4**, Applicants wrongly made an application under Section 31 (3) and (4) of the Trust Act to show the reason the Respondents should not transfer files and documents to the new trustee of the Trust. The order with regard to exercise functions and conduct should have been lodged under Section 63 of the Trust Act before the Supreme Court and not under Section 31. It was concluded that the Judge in Chambers has no jurisdiction to determine the application as the issue concerned relates to Section 63(1) of the Trust Act whereby only the Supreme Court can intervene. The Application was set aside.

The scattergun approach adopted by Counsel for the Applicant in the present matter made her miss the target from interpreting correctly section 72(8) and 74 of the Workers' Rights Act 2019 (as amended). We find it convenient to quote what the Law Lords of the Privy Council had to say in **GROVE PARK DEVELOPMENT LTD (APPELLANT) v. THE MAURITIUS REVENUE AUTHORITY AND ANOTHER (RESPONDENTS) (MAURITIUS) – [2017] UKPC 4**:

> *32. By way of postscript, the Board records a contention that, even in the event that its construction of the statutory condition was to prove adverse to the company, it should allow the appeal on the ground that, by its decision in the letter dated 16 September 2011, the authority had acted unfairly towards it. Under this rubric Mrs Boolell brings a scattergun approach to the task of advocacy. She contends that the decision had been irrational; that it had been unexplained; that there had been no level playing-field; that the authority had misused its power; that it should have sought clarification of Mr Mooroogan's breakdown of the figures; that it had had a discretion when deciding whether the condition had been satisfied; that in this respect it should have been guided by Mr Mooroogan and any quantity surveyor instructed by itself; that it had failed to act transparently; that its decision*

had frustrated the purpose behind the 2009 Act; and that it had defeated a legitimate expectation on the part of the company that it would be taken to have satisfied the condition.

33. The trouble is that there was no arguable foundation for any of these contentions.

No doubt *"...whilst tribunals like the Board are purposely set up to conduct their proceedings with some measure of elasticity, common sense, and attention to the prevailing socio-economic pulse, should normally carry more weight than juridical reasoning..."* **(La Bonne Chute Ltd v. Termination of Contracts of Service Board and Anor – 1979 MR 172)**, we cannot compromise on application of substantive law.

For the reasons stated above, this application is misconceived and constitutes an abuse of process. It cannot succeed and is set aside.

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Rashid Hossen
(President)

(SD)

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Mrs. Amrita Imrith
(Member)

(SD)

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Ms. Saveetah Deerpaul
(Member)

(SD)

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Ms. Chandrani Devi Gopaul
(Member)

Date: 25th February 2021