REDUNDANCY BOARD

RB/RN/14/2023

ORDER

Before:	Rashid Hossen	-	President
	Shirine Jeetoo (Mrs)	-	Member
	Saveeta Deerpaul (Ms)	-	Member
	Christ Paddia	-	Member
	Feroze Acharauz	-	Member

Mauritius Mental Health Association
and
Mrs Sharada Joymangul and Mrs Jessica Sunnasy
(Employees)

A written notification of an intended reduction of workforce was lodged before the Redundancy Board (Board) by the Mauritius Mental Health Association (Employer) with regard to 2 Employees namely Mrs Sharada Joymangul and Mrs Jessica Sunnasy (Employees).

The Employer was not assisted by Counsel. Employee Mrs Sharada Joymangul reached an agreement with the Employer whereby her case is no more to be determined by the Board. Employee Mrs Jessica Sunnasy who henceforth will be referred to as the "Employee", was assisted by Mr M. Ramano, of Counsel.

The Employer and Employee filed each a Statement of Case.

The Employer avers that it is a Non Governmental Organisation created by an Act of Parliament in 1974 and presently runs a Specialized Education Needs School called "Le Colibri" which depends entirely on government grant for payment of salaries of the staff. It has over the years witnessed a significant decrease in the number of beneficiaries at the school due mainly to the opening of new SEN schools. The Employer is presently running 6 classes with a maximum of

42 beneficiaries. On a daily basis, there is an average of 27 beneficiaries attending the school who could fit in only 4 classes. Considering it has a surplus of 3 teachers, 1 of whom has only retired, there remains a surplus of 2 teachers. The Employer is therefore applying to the Board to consider making redundant Mrs S. Joymangul and Mrs J. Sunnasy. The choice has been made on the basis of "*Last in, First out*", in the list of teachers. The 2 Employees were convened respectively by the management to inform them of the above decision. The Employer avers that both Employees took cognizance of same in a meeting dated 9th May 2023. Management was agreeable to enter into negotiation with them and as such they were given 1 week to make a proposal, if any. They were also informed to be represented by a recognised Union, the PEEU, as they fall under the bargaining Unit of the Union. On 19th May 2023 the 2 Employees were called by Management to communicate their intention. While Mrs. S. Joymangul signified her intention to negotiate, Mrs J. Sunnasy refused.

The Employee's case as per the averments in her statement of case is the following:-

- the Employer ought to have obtained the approval of the Special Education Needs Authority prior to proceeding with a reduction of workforce;
- the Employer had not notified the existing Union prior to the meeting of the 09th May 2023 of the decision to reduce the workforce on the basis of "*Last in, First out*";
- there was no negotiation to explore the possibility of avoiding redundancy;
- the decision to make her redundant was taken prior to any attempt at negotiation;
- the only proposal made to the Employee was whether she should resign or be put before the Redundancy Board;
- there was no representative present of the existing Union at the meeting of 09th May 2023;
- the Employee was convened to a meeting on 15th May 2023 during which she was handed an anonymous letter containing threats to the Employee. This matter was reported to the Police;
- her request to be represented by Mr. Jack Bizlall was turned down by the Employer;
- she could not have been expected to attend a meeting on the 19th May 2023 given that she was under duress and pressure; and
- the Employee moves that the notification before the Board be set aside.

<u>Notification and Negotiation</u>

There is a two-tier requirement imposed by Section 72(1) of the Workers' Rights Act 2019, as amended, on an employer who intends to reduce the number of workers in his employment. The first one is with regard to notification followed by negotiation 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 worker's 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 of 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."

The Employee is not a member of any recognised trade union or one that has a representational status. Considering that only 2 employees being concerned with the redundancy, it stands to reason that the Employer can start negotiation process directly with them. The latter were convened to a first meeting on the 09th of May 2023, inviting them for negotiation and they were given a week to make a proposal, if any and it cannot be said that the employee was not notified about the redundancy. Counsel for the Employee conceded to this issue during his submission.

As regard negotiation, the Employee was to return to the negotiation table and make a proposal. On 19th May 2023 she was called again by management to communicate her intention and the Employee refused all negotiations. This averment by the Employer has not been convincingly refuted by the Employee. The Employee's allegation that she could not take a decision after being shown an anonymous threatening letter does not hold water. The Employer's intention to negotiate to avoid the possibility of redundancy is even confirmed in the deposition of Mr Jack Bizlall, a witness for the Employee:

"……*l'intention de Mons. Grandport s'était pas pou mette li dehors, c'était pou trouve ene transfère au cas contraire qui ça vine ici*."

In our view, it would be unfair to infer that the Employer has not made any attempt at negotiation. An employer cannot be expected to chase and beg an employee day and night to enter into discussion regarding redundancy. As much as it is a duty on an employer to negotiate, his task is hampered if an employee shows no willingness to discuss. Without the Employee's involvement, the Employer's effort to find a solution to avoid redundancy and reach a satisfactory agreement goes in vain. It was essential for the Employee to demonstrate a genuine interest to negotiate.

"….ler la li dire moi li pou mettre moi Redundancy Board, si jamais pas ena auccune solution." This latter averment under oath by the Employee shows again the Employer's intention to negotiate. Indeed, she was called again to discuss matters on 04.08.23 but could not attend the meeting due to her illness. She could have asked for a delay to attend. We consider therefore that this is a situation where no negotiation has taken place and the Legislator has catered for such circumstance in Section 72 Sub-Section (5), whereby, where no negotiation has taken place, the employer can lodge a notification for redundancy before the Board.

Last in First out

The Last In First Out (LIFO) policy, is a method of redundancy selection that involves selecting employees for redundancy on the basis that those with the shortest service should be selected first. Because younger employees tend to have shorter service, there can be significant risks for employers if used as the sole criterion for redundancy selection. The risks can be lessened if used alongside other redundancy selection criteria. Whether used on its own or alongside other criteria, the only thing relevant for LIFO is an employee's length of service. Employees with the least amount of service time are selected for redundancy first, whilst those with a longer service time, effectively those who came into the company first, are selected last.

Indirect discrimination is defined in S6 of the Equal Opportunity Act 2008. According to this section,

(1) A person ("the discriminator") discriminates indirectly against another person ("the aggrieved person") on the ground of the status of the aggrieved person where –

(a) the discriminator imposes, or proposes to impose, a condition, requirement or practice on the aggrieved person;

(b) the condition, requirement or practice is not justifiable in the circumstances; and

(c) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging the aggrieved person when compared to other persons of the same status.

In Mauritius while making an employee redundant in some cases, emphasis have been put on the "*last in first out principle"* where at some time the principle was considered to be just part of the code of practice while in some cases the principle was prescribed in the Employment Rights (Amendment) Act 2013, but was not included in the Workers' Rights Act 2019 following the repeal of the former Act.

In the matter of **LA BONNE CHUTE LTD. vs TERMINATION OF CONTRACTS OF SERVICE BOARD and ANOR 1979 MR 172**, the applicant gave notice to the Minister of Labour and Industrial Relations, pursuant to section 39(2) of the Labour Act 1975, that it intended to reduce its work force by terminating the contracts of employment of two workers on account of compelling

financial reasons. The Court observed that the Code of Practice does not formally lay down the concept "*last in first out*" as such. Secondly, it is meant to regulate and improve industrial relations generally.

In **Concorde Tourist Guide Agency Ltd vs. Termination of Contracts & Others 1985 MR 70 1985 SCJ 99** the Concorde Tourist Guide Agency Ltd (the Company) duly notified the Minister of its intention to reduce the number of its employees because of redundancy, indicating their address, post, date of entry and present salary was submitted. The matter was referred to the Termination of Contracts of Service Board (the Board) for consideration relating to two of the employees listed. The Board accordingly held that the dismissal of the two employees was unjustified. The Company prayed that this decision of the Board be quashed, reversed and set aside as The Board was wrong to have held that the principle "last in first out" should have applied in the case of employees of different status. The Applicant went on to say that what the Board is to decide in cases of intended reduction of work force referred to it by the Minister under subsection 3 is not whether the dismissal, as such, of any particular worker is justified or not, but whether the employer's reduction of the number of workers in his employment is justified or not. It results, however, from the decisions of this Court in the cases of La Bonne Chute Ltd v TCSB [1979 MR 172] and Madelen Clothing Co Ltd v TCSB [1981 MR 284] that the Board, although finding a reduction of workforce by a certain number to be justified, is still entitled to consider whether the decision by the employer to dismiss a particular worker(s) within that number is the correct one….. The Court went on to say that it need not, in view of the above, pronounce on the forceful submission made to it by counsel who appeared for the Company that seniority, that is the principle of "*last in first out*", should only be a proper criterion to be insisted upon "all things being equal". It may say however that, in the context of what it has already observed, it must stand to reason that the application of the "*last in first out*" principle requires a sufficient connexity in the specifics of particular posts, including their relative status, existing as between the workers concerned. Whether the required connexity exists or not would be a matter for the Board to consider in any particular case…….

In H. Nunkoo v. Mauritius Biscuit Making Company Ltd (In Receivership) 2015 IND 54,
the plaintiff moved for a judgment ordering the defendant to pay to him the sum of RS 741,961.81 together with such amount by way of compensation for wages lost and expenses incurred in attending Court and interests at the rate of 12% per annum on the amount of severance allowance as he considered the termination of his employment to be unjustified.

The case was for the payment of severance allowance and outstanding payment of wages as well as balance of indemnity in lieu of notice following the termination of the plaintiff's employment on economic grounds. It is the contention of the plaintiff that the reasons for the termination of his employment were unjustified the more so that the defendant chose to

maintain a junior salesperson at his expense and has therefore failed to follow the principle of "last in first out."

It is significant that prior to the amendment by Act 6 of 2013, the Employment Rights Act 2008 [ERA] did not provide for any procedure in case of reduction in workforce or redundancy as was the case in the Labour Act 1975. Act 6 of 2013 which came into operation on 11 June 2013 added a new Part VIIIA which provides that certain procedures and rules had to be followed when an employer of not less 20 workers decides to reduce his workforce. The concept of "last in first out" as an enforceable obligation in case of inevitable redundancy was introduced by Section 39B(3)(b)(i) which reads as follows:

39B. Reduction of workforce

(1) ...

(3) Notwithstanding this section, an employer shall not reduce the number of workers in his employment, either temporarily or permanently, or close down his enterprise unless he has –

(a) …

(b) where redundancy has become inevitable –

(i) established the list of workers who are to be made redundant and the order of discharge on the basis of the principle of last in first out; and

(ii) given the written notice required under subsection (2).

As the present termination took place on 31 July 2012 thus before the coming into force of Act 6 of 2013 on 11 June 2013 it is the Employment Rights Act 2008 in its original form which is of application to the present case. There was no "legal" requirement in case of redundancy to comply with the "last in first out" principle.

As the plaintiff's employment was terminated on ground of redundancy, the burden lies on the employer to satisfy the Court that there were valid economic, technological, structural reasons for terminating the plaintiff's employment and where such economic, technological structural grounds were not valid the Court may order the employer to pay severance allowance to the employee.

The Court held that the plaintiff has established his case against the defendant company on the balance of probabilities that the grounds for the termination of his employment on the ground of redundancy was unjustified. The defendant company has also failed to prove justification that is the economic, technological and structural grounds were valid. It was therefore concluded that the plaintiff's dismissal was unjustified and that he is entitled to the payment of severance allowance as provided by law.

Rolls-Royce Plc v Unite the Union [2009] EWCA Civ 387 (14 May 2009)

Is a case about whether using length of service as a criterion for redundancy selection constitutes unlawful indirect age discrimination against younger workers.

Rolls Royce sought a declaration from the High Court that continuing to apply a collective agreement which included service in the redundancy selection matrix would be unlawfully discriminatory. The High Court held that using length of service was not unlawful.

The Court of Appeal dismissed Rolls Royce's appeal and ruled:

- The inclusion of the length of service criterion satisfies the ordinary test for justifying indirect age discrimination. It is a proportionate means of meeting a legitimate aim - i.e. the reward of loyalty and experience and the desirability of achieving a stable workforce. Proportionate means were demonstrated by the fact that length of service was only one of a substantial number of other criteria and by no means determinative.
- Alternatively, the length of service criterion constitutes a 'benefit' within regulation 32 of the Age Regulations. Viewed objectively, a length of service criterion of more than five years reasonably fulfils a business need of the employer - i.e. having a loyal and stable workforce.

The upshot of this decision is largely to legitimise the use of service-based redundancy selection criteria. In particular, regulation 32 allows a blanket exception for all service-related benefits where the service taken into account is five years or less and provides a relatively low test of justification in respect of service-related benefits for employees with longer service,

Despite this, it would almost certainly be unlawful to apply a "last in first out" (LIFO) system - i.e. using length of service *alone* as the basis for selection. In this respect, the Court of Appeal judgment is consistent with the High Court's statement that using solely LIFO "might be objectionable". However, "*where there is an agreed redundancy scheme ... which uses a length of service requirement as part of a wider scheme of measured performance, it is probable ... that such would be regarded as reasonably fulfilling a business need*."

Joanne Allan v Oakley Builders and Groundwork Contractors Ltd, Case number 1403798/2018

Joanne Allan joined Oakley Builders and Groundwork Contractors Ltd ("Oakley") on 9 May 2016 as an Administrative Assistant. She was told in her interview that in the event of there being a redundancy situation there would be a "last in first out" method of selection. On 19 July 2018, a cost-cutting exercise was put in place. Employees were pooled, with one (Ms Hamley, a manager) being told that, due to her long service, she would not be selected. Ms Allan was pooled alongside Ms Wise and Ms Zab. Ms Allan was older than these individuals, both of whom were in their 20s. The individual making the selections was Mr Wise, the father of Ms Wise. Ms Allan was subsequently selected due to her shorter service and was given 2 weeks' notice before her employment ended on 24 August 2018. Ms Allan brought a claim of age discrimination in relation to her selection and dismissal. The Employment Tribunal dismissed

Ms Allan's claim. The Employment Tribunal held that "last in first out" is now "largely discredited" as a means of selection for redundancy. It is noted that such a policy can be both indirect sex and age discrimination (women tend to have shorter employments than men, and younger workers have less opportunity to gain service). Neither were relevant in this case - the entire pool was female and Ms Allan was the oldest of the pool.

The Employment Tribunal said that whilst "last in first out" is "not everyone's first choice" it is not an irrational method to use to select individuals for redundancy. It is entirely objective and avoids having to judge people. The Employment Tribunal also noted Ms Allan's allegations that Ms Wise had not been selected due to nepotism. This further undermined a claim of age discrimination as, if this were the case, any difference in treatment would be because of this, and not because of age. Accordingly, there was no difference in treatment because of age and so the claim was dismissed.

Williams v Compair Maxam Ltd [1982] ICR 156

Compair Maxam Ltd was a losing business. The leaders of the teams of core staff who can be retained to keep the business viable. They have chosen a personal preference for what they thought would be good for the company, but the Union was not consulted. Other employees were dismissed for redundancy and given money above and beyond the statutory minimums. Five workers claimed that the dismissal was unfair. The court rejected the claim, stating that the preferences of managers is a smarter way to do the job. It was appealed on the basis of perversity. Browne-Wilkinson J said that it was an error of law and the dismissal selection was unfair. A dismissal for redundancy should depend on the circumstances of each case. There is a generally accepted view in industrial relations that reasonable employers will seek to act in accordance with the following principle amongst others. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or **length of service**. (emphasis is ours).

We refer now to part of the International Labour Office report of March 2013:

18. ***Clause 22 of the Bill*** *– The new version of Article 39B "Reduction of the workforce", in* ***Paragraph 3(b)*** *stipulates that workers are to be redundant "on the basis of the principle of last in first out". The Office invites the government and the social partners to reconsider the proposed selection criterion.*

18.1 *With respect to selection of workers to be dismissed for economic reasons, Recommendation No. 166 suggests that this should be done by the employer, in consultation with workers' representatives, according to criteria, established wherever possible in advance, which give due weight both to the interests of the enterprise and to the interests of the workers.*

18.2 *In comparative law and practice, the most frequently used criteria are skills, productivity and social considerations (Please see Annex 3).*

18.3 *Legislation in a limited number of countries (Argentina, Bangladesh, Malaysia, Mexico. Netherlands. Nigeria, Pakistan, Panama, Sweden, the United States of America) refers explicitly to the selection criterion "last in, first out".*

18.4 *Recent case law, for instance in the United Kingdom, has questioned this selection criterion. It is considered to be valid only if embodied in the collective agreement and under the express condition that it is not the only criterion employed in the selection process. Otherwise, this criterion may be challenged* as *indirect discrimination on the grounds of age. Even if loyalty should be rewarded, young workers may be particularly affected by this rule.*[1] ***Muller Angelika, 2011. "Employment protection legislation tested by the economic crisis. A global review of the regulation of collective dismissals for economic reasons", Industrial and Employment Relations Department, ILO, Geneva.*** *http://www.ilo.org/ifpdial/information-resources/publications/WCMS 166754/lang-en/index.htm*

On a separate note, we find the following gives us an insight on the situation in France :

Code du travail France

Chapitre III : Licenciement pour motif économique (Articles L1233-1 à L1233-91)

Sous-section 4 : Critères d'ordre des licenciements. (Articles L1233-5 à L1233-7)

Article L1233-5

Modifié par Ordonnance n°2017-1718 du 20 décembre 2017 - art. 1

Lorsque l'employeur procède à un licenciement collectif pour motif économique et en l'absence de convention ou accord collectif de travail applicable, il définit les critères retenus pour fixer l'ordre des licenciements, après consultation du comité social et économique.
Ces critères prennent notamment en compte :

1° Les charges de famille, en particulier celles des parents isolés ;

2° L'ancienneté de service dans l'établissement ou l'entreprise ;

3° La situation des salariés qui présentent des caractéristiques sociales rendant leur réinsertion professionnelle particulièrement difficile, notamment celle des personnes handicapées et des salariés âgés ;

4° Les qualités professionnelles appréciées par catégorie.

L'employeur peut privilégier un de ces critères, à condition de tenir compte de l'ensemble des autres critères prévus au présent article.

Le périmètre d'application des critères d'ordre des licenciements peut être fixé par un accord collectif.

En l'absence d'un tel accord, ce périmètre ne peut être inférieur à celui de chaque zone d'emplois dans laquelle sont situés un ou plusieurs établissements de l'entreprise concernés par les suppressions d'emplois.

Les conditions d'application de l'avant-dernier alinéa du présent article sont définies par décret.

Article L1233-6

Les critères retenus par la convention et l'accord collectif de travail ou, à défaut, par la décision de l'employeur ne peuvent établir une priorité de licenciement à raison des seuls avantages à caractère viager dont bénéficie un salarié.

Article L1233-7

Lorsque l'employeur procède à un licenciement individuel pour motif économique, il prend en compte, dans le choix du salarié concerné, les critères prévus à l'article L. 1233-5.

What we observe therefore is that in case of individual or collective dismissals for economic or structural reasons, the employer needs to consider certain criteria for the selection of employees to be made redundant. If applicable, the employer applies the collective agreement's criteria for the implementation of an Employment Security Plan (Plan de sauvegarde de l'emploi). When no collective agreement applies, the employer has the responsibility to define selection criteria, which need to include the following elements:

family expenses, especially with respect to single parents;
seniority in the company;
professional qualities;
any situation that might make it difficult to find work (for instance, on account of age or disability).

CONCLUSION

The Board would not probe into the power vested in the Special Education Needs Authority as any alleged breach of its power is to be referred to the appropriate forum.

There has been no evidence adduced with regard to any accord in a Collective Agreement whereby the principle of "*Last in First Out*" would be applicable in case of redundancy. The Employer has not joined any other criterion/criteria to that of the "*Last in First Out*", the Board considers that the singular criterion (*Last In First Out*) chosen by the Employer, cannot be allowed.

Accordingly, the Board orders the Employer not to reduce his workforce.

SD

……

Rashid Hossen
(President)

SD

……

Shirine Jeetoo (Mrs)
(Member)

SD

……

Saveeta Deerpaul (Ms)
(Member)

SD

……....

Christ Paddia
(Member)

SD

……

Feroze Acharauz
(Member)

Date: 13th September 2023