REDUNDANCY BOARD

RB/RN/10/2022

ORDER

Before:	Rashid Hossen	- President
	Christ Paddia	- Member
	Saveetah Deerpaul (Ms.)	- Member
	Yashwinee Chooraman (Ms.)	- Member
	Shirine Jeetoo (Mrs)	- Member
	Suraj Ray	- Member
	Feroze Acharauz	- Member

Miss Estelle Berthaud

and

Ambrex Ltd

This is an application under Section 72(8) of the Workers' Rights Act 2019, as amended pursuant to an alleged breach of Section 72(1),(1A) and (5) of the Workers' Rights Act 2019, as amended. Miss Estelle Berthaud, hereinafter referred to as the Applicant, is praying for an Order directing her employer Ambrex Ltd, hereinafter referred to as the Respondent, to pay to her severance allowance at the rate specified in Section 70(1) of the Workers' Rights Act 2019, as amended.

Mr. Shakeel Mohamed, Counsel, appeared for the Applicant and Mr. Nabiil Kaufid, Counsel, appeared for the Respondent.

In her Statement of Case, Applicant avers that:-

- She joined the Respondent as Head of Digital Marketing for all luxurious brands of Group Ambre SA on a full-time basis on 4 August 2020.
- Respondent is engaged, inter alia, in the business of watches, jewelleries and clocks.

- Her duties consisted of the planning, coordination and supervision of all tasks executed by the Web Design & Web Marketing department team. She was also responsible for the co-envisioning and co-executing of the Respondent's online presence (online stores, online advertising campaigns, online media articles, newsletters, banners, artworks & videos, amongst others).
- She was supervised and coached by and reported to the Respondent, in particular, to one Mr. Anibal Martinez.
- As Head of Digital Marketing, she was earning a monthly salary of Rs.120, 000.
- On 7 December 2021, he complained, by way of email, that the rules pertaining to sanitary protocols regarding the Covid-19 pandemic were not being compiled with.
- She required 3 days of rest from 9 December 2021 for medical reasons.
- Following a visit to her Gynaecologist on 9 December 2021, she was advised to start her maternity leave as from 13 December 2021 for medical reasons.
- On 9 December 2021, she sent a mail informing the Respondent of her state of health together with the aforementioned medical certificates.
- By a letter dated 13 December 2021, she was informed that she was granted 2 days of sick leave, without pay for 9 and 10 December 2021. She was also informed that her request for early maternity leave was granted.
- On 21 March 2022, she was advised by her Gynaecologist to stay off work for 2 weeks owing to her postnatal infection. She informed the Respondent of same through email with medical certificate attached.
- By way of a letter dated 21 March 2022, she was informed that she was made redundant, with immediate effect, in view of the restructuring of the company and costs cutting.
- In the letter mentioned above, she was also informed that she was entitled to a 30 days' notice payment according to her contract of employment, the balance of her annual leaves on a prorata basis i.e., 7.33 days and she was informed to collect same on 4 April 2022.
- On 28 March 2022, she was informed by way of letter, that she was entitled to only 5 days of sick leave on a prorata basis (4 months) and that her 1 month's notice was to take effect as from 28 March 2022.
- On 5 May 2022, she signed a "Quittance" stating that she received a sum of Rs. 216,336.38, representing 5 days of sick leave, 1 month notice as from 28 March 2022

+ EYB prorata (4 months) and a prorata of the annual leave as mentioned the paragraph above.

- She was advised and verily believes that in terminating her employment in the manner described above, the Respondent has breached Section 72(1), (1A) and (5) of the Workers' Rights Act and was therefore entitled to the full amount of severance allowance as provided for under Section 70(1) of the Workers' Rights Act.
- She consequently prays from the Board for an Order directing the Respondents to pay to her the sum of Rs.600,000 representing the severance allowance as per the rate specified in to Section 70(1) of the Workers' Rights Act, computed as follows:
  Severance Allowance Rs 120,000 x 3 months x (1 year 8 months) Rs. 600,000
- She also prays for any Order as the Board may deem fit in the circumstances.

In its reply, Respondent avers that:

- It has complied at all times with the relevant provisions of the Workers' Rights Act, more particularly, with Section 63 (5) which states that "any party may, in lieu of giving notice of termination of agreement, pay to the other party the amount of remuneration the worker would have earned had he remained in employment during the period of notice".
- As per the contract of employment between the Respondent and the Applicant, it was clearly stipulated that insofar as termination of employment is concerned, "each party, shall where it decides to terminate the contract of employment, give notice of 30 days to the other party". It humbly submits that is has strictly adhered to the aforesaid terms of the said contract of employment in respect of the right of the Applicant arising thereof.
- The Applicant has herself confirmed in her Statement of Case, that she has signed a "Quittance" stating that she has received a sum of Rs. 216,336.38, representing 5 days of sick leave, 1 month notice as from 28 March 2022 + EYB prorate (4 months) and a prorate of the annual leave.
- It humbly submits that by signing the aforesaid "QUITTANCE" voluntarily and out of her own free will, it was a mutual agreement between both the Applicant and the Respondent that her employment would be terminated and same was consented to by both parties. It denies having breached Section 72(1), (1A) and (5) of the Workers' Rights Act and put the Applicant to the strict proof thereof.
- The application is frivolous and vexatious and must be set aside.

The Applicant confirmed under oath the contents of her Statement of Case. She insisted that regarding her letter of termination, reference was made to the structuring of the company with a view to cutting costs, whereby her services would no longer be required. She resolutely contests that she ever consented to the termination of her contract by signing voluntarily the "*Quittance*".

The Managing Director at the Respondent, Mr Pascal Bole, explained the company's business and the role played by the Applicant. He stated at the outset that the Applicant's performance within the company was disappointing and he therefore decided that Applicant is to be excluded from the company as employee.

He denies any restructuring within the company. According to the witness, the fact that the contract specifies that each party shall where it decides to terminate the contract of employment, give a notice of 30 days to the other party, he understood it to be that either party can terminate the contract without having to furnish any reason.

He agrees that the letter sent to the Applicant refers to restructuration and cutting of costs. He said he simply had not expressed himself correctly. The "*Quittance*" for him is evidence of the mutual agreement of the termination of contract.

SUBMISSIONS

In their respective submissions, each of the parties addressed a number of considerations.

Counsel for the Respondent submitted firstly that there is a binding contract between the Applicant and the Respondent. His second point is that there has been a "*Quittance*" which has been signed freely and voluntarily. His final point is that there has been no restructuring with a view to reduce the workforce in the company and therefore no breach to the Sections of the Workers' Rights Act 2019, as amended, referred above.

Counsel for the Applicant submitted that the letter of the 21st of March 2022 terminating the Applicant's contract clearly refers to restructuring and the cutting of costs within the company. The Respondent was not allowed to terminate the contract within the prescribed period. It is not an issue of performance of the employee but a clear case of reduction of workforce on economic grounds. The employer had not applied for any financial assistance in the present matter. With regard to the "*Quittance*", it must not be read that the intention of the parties was to put an end to a dispute.

BOARD'S CONSIDERATIONS

We will address our mind to the following three issues which we consider essentially relevant in determining the present matter:

(1) Nature of the contract

For clarity, we are reproducing the contents of the contract:

Contract of employment

Between

Ambrex Ltd, having its premises at Cnr Riche Terre Road and Royal Road Baie du Tombeau

And

Ms Estelle Berthaud residing at D3 Palm Green Villa, Rue de la petite Salette, Grand Bay

1. You have been offered the post of Head of Digital Marketing for all luxurious brands of the Group Ambre SA.
2. **Your duties will be as follows:**
   - You will be responsible for the Planning, Coordination & Supervision of all tasks executed by Web Design & Web Marketing department team.
   - Responsible for the co-envisioning and co-executing of our online presence (online stores, online advertising campaigns, online media articles, newsletters, banners, artworks & videos, etc…).
3. **Remuneration**
   You will be paid a monthly fixed salary of MUR 120,000/-
4. **Working Hours**
   You will work on a regular Mauritian Business hours. Based on the fact that a part of the team is based in France, you might need to work as well during evening hours whenever required.
5. Your first day of work will be on the 04th of August 2020.
6. You will be supervised, coached and will report to Anibal Martinez.
7. **Termination of Employment**
   Each party, shall where it decides to terminate the contract of employment, give a notice of 30 days to the other party.

Made in two copies on the……..

…… **(SD)** ……. **(SD)**

PASCAL BOLE **ESTELLE BERTHAUD**

MANAGING DIRECTOR

We note that while the monthly fixed salary of Rs 120,000 exceeds the sum of Rs 50,000 monthly, and as provided for in the Workers' Rights Act 2019, as amended, the Act *(supra)*, applies to cases of termination of agreement and reduction of workforce.

This provision is to be found in Section 3 of the Act *(supra)*:

*"**3. Application of Act***

(1) Subject to subsection (2) and to any provisions to the contrary in any other enactment, this Act shall apply to every agreement.

(2) This Act shall not apply to

(a) a public officer or a local government officer, except in relation to sections 5, 26, 114, 118, 119, 120 and 123(1)(f), (2), (3) and (4);

(b) a worker of a statutory body who is, or has opted to be, governed by the terms and conditions in a report of the Pay Research Bureau, except in relation to–

(i) sections 5, 26(1),51A,118, 119, 120 and 123(1)(f),(2), (3) and (4), in so far as they relate to that worker; and

(ii) Parts VI and XI;"(Emphasis is ours).

PART VI-TERMINATION OF AGREEMENT AND REDUCTION OF WORKFORCE deals specifically with termination of agreement.

Is it a fixed term contract or an indeterminate agreement?

Section 127 of the Act *(supra),* where reference is made to the savings and transitional provisions, Section (1) (a) stipulates:

"Where, before the commencement of this Act, a worker and an employer have entered into one or more determinate agreements for a total period of more than 12 months and where the worker was employed in a position of a permanent nature, the agreement shall, on the commencement of this Act, be deemed to be an indeterminate agreement with effect from the month immediately following the twelfth month of employment under the agreement".

For completeness sake, we need now to refer to the provision relating to Fixed Term Agreement.

*"**13. Fixed term agreement***

(1) Notwithstanding subsection (4), an employer may enter into an agreement with a worker for a specified period of time in relation to the temporary needs of the employer –

(a) for the performance and completion of a specific piece of work which is temporary and non-recurring;

(b) in respect of any work or activity which is of a temporary, seasonal or short-term nature or short-term work arrangement that are normally project related and aligned to changes in the product market;

(c) in replacement of another worker who is on approved leave or suspended from work;

(d) for the purpose of providing training to the workforce;

(e) for a specific training contract; or

(f) in accordance with a specific work or training scheme set up by the Government or a statutory body for a determinate duration.

(2) Subsection (1) shall not apply to –

(a) the exclusion of limitations of the rights of a worker; or

(b) the deprivation of the right of a worker to permanent employment.

(3) Where a worker is employed on a fixed term contract, the worker shall be informed in writing by his employer of the specific skills required, the specific tasks to be carried out and the duration thereof

(4) A worker, other than a migrant worker, who is employed in a position which is of permanent nature, shall not be employed on a contract of fixed duration for the performance of work relating to the fixed, recurring and permanent needs of the continuous normal business activity of the employer.

(5) Where a worker is employed on a fixed term contract, his terms and conditions of employment shall not be less favourable than those of a worker employed on an indeterminate contract performing the same or similar work, having regard where relevant, whether they have a similar level of qualifications, skills or experience.

(6) A worker employed on a fixed term contract shall be deemed to be in continuous employment where there is a break not exceeding28 days between any 2 fixed term contracts.

(7) An employer shall inform a worker employed on a fixed term contract of any vacancy of a permanent nature in the same category and grade to his current employment."

It holds good therefore that the contents of the present contract of employment purport to establish that it is one of an indeterminate nature. Furthermore, the contract is within the ambit of the Workers' Rights Act 2019, as amended.

Does the contract fall within the scope of reduction of workforce?

We do not have the slightest doubt that when the letter of termination (Document I) specifically and explicitly states that *"……..with a recent restructuring in the company and with a view to cutting costs,……your services will be no longer required……."*, the present application falls squarely within the ambit of reduction of workforce.

Indeed, we are far from being impressed by the testimony and demeanour of Mr. Pascal Bole, the Managing Director, at the Respondent when the latter in spite of being under oath, stated that he had not expressed himself properly when he had referred to the restructuring of the company. We believe that his lame argument of not being fluent in English could not prevent him from expressing himself in his mother tongue.

At the very outset of his testimony, Respondent's witness jumped into the arena of a failure on the part of the Applicant. He claimed that the Applicant was showing a disappointing result of what was expected from her. However, we see no evidence of any procedure that had been triggered regarding the Applicant's poor performance, if only a letter of termination on the ground of restructuring and costs cutting. Any failure on the part of an employee with regard to the contract of employment would certainly remove the matter from the jurisdiction of the Board which deals essentially with *"licenciement pour motif économique"*.It would then be what is commonly referred to as *"licenciement pour motif personnel"*. 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 by Courts as well as by 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"".

A 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:

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, 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".

It is clear to us that the termination of Applicant's employment contract is in relation to an economic reason. The actual language of the release (Doc I) could not be more explicit. Furthermore, there is nothing reliable in the surrounding circumstances which negates its straightforward language. Accordingly, we find no indication in the actual language of the employer that it contemplated termination on the ground of poor performance.

(2) <u>Notice of termination</u>

It is not disputed that paragraph 7 of the Applicant's contract of employment refers to the termination of employment where a notice of 30 days is to be given from one party to the other, should any one party decide to terminate the contract of employment. This paragraph clearly specifies the agreement reached on the time the notice is to be served which is the minimum provided by law. It says no more than that.

It is the contention of the Respondent that it did give the required notice of termination of the agreement and that as such it was open for it to terminate the agreement without the payment of severance allowance. We consider this reasoning on the part of Counsel for the Respondent to be fundamentally misconceived. We say so respectfully. It is trite law that the terms of the contract are the laws of the parties and full effect should be given. Indeed, Article 1134 of the Code Civil provides: *"Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites."*

«1780. Les contrats de louage des gens de travail qui s'engagent au service de quelqu'un seront régis par le Labour Act.

1781. Le louage de service fait sans détermination de durée peut toujours cesser par la volonté d'une des parties contractantes. Néanmoins, ***<u>la résiliation du contrat par la volonté d'un seul des contractants ne peut être admise que dans les conditions et formes requises par le Labour Act".</u>*** (Underlining is ours).

It makes no doubt that the present work agreement is one for an indeterminate period. Articles 1780 and 1781 of the Code Civil specifically refer to the application of the Labour Act in respect of *"contrats de louage des gens de travail"* and for termination of a work agreement for an indeterminate period by one party which is governed only *"dans les conditions et forms requises par le Labour Act."*

In **D. Shamboo v. The Mahatma Gandhi Institute [2006 MR 133]**, the Supreme Court pointed out that where one of the parties terminates the contract of employment there is need to adhere to the *«conditions et forms requises par le Labour Act »* in conformity with article 1781. Although the above two articles of the Code Civil have not been amended to refer to the Workers' Rights Act following the repeal of the Labour Act 1975, in view of Section 18 of the Interpretation and General Clauses Act [IGCA], reference to the repealed Labour Act

is to be construed as a reference to the WRA 2019, as amended. Section 18 IGCA provides as follows:

18 Re-enacted provisions

Where an enactment repeals and re-enacts another enactment, with or without modification, any reference to the repealed enactment in any other enactment shall be construed as a reference to the re-enacted provision.

The application of the Workers' Rights Act 2019, as amended (WRA) is provided for in Section 3 of the Act:

(1) Subject to subsections (2) and to any provisions to the contrary in any other enactment, this Act shall apply to every agreement.

(2) This Act shall not apply to –

(a) a public officer or a local government officer, except in relation to sections 5, 26, 114, 118, 119, 120 and 123(1)(f), (2), (3) and (4);

(b) a worker of a statutory body who is, or has opted to be, governed by the terms and conditions in a report of the Pay Research Bureau, except in relation to –

(i) sections 5, 26(1),51A, 118, 119, 120 and 123(1)(f), (2), (3) and (4), in so far as they relate to that worker; and

(ii) ***Parts VI*** *and XI;(emphasis is ours).*

An agreement is defined as a contract of employment or a contract of service between an employer and a worker, whether oral, written, implied or express.

For the purposes of the WRA, a worker does not include a person whose basic wage or salary is at a rate in excess of 600,000 rupees per annum except in relation to Sections 5, 26, 31 and 51A; and Parts VI, VII, VIII, XI, XII and XIII.

Part VI of the WRA deals with termination of a work agreement.

It is clear from the admitted facts of the present case that the Applicant had a work agreement with the Respondent since 04 August 2020 and that notice of termination of agreement was communicated to her by the Respondent on 31 March 2022 to take effect on the same date. The Applicant was thus in the continuous employment of the Respondent well above 12 months and although her salary was well above RS 600,000 yearly, Parts VIII and X of the

WRA apply, particularly the provisions relating to the protection against termination of agreement (Section 64) and the payment of severance allowance (Section 69).

In the present case, paragraph 7 of the written agreement provides that the agreement may be terminated by either party giving to the other not less than 1 month written notice. Section 63 of the Workers' Rights Act 2019, as amended also provides that a party to an agreement may terminate the agreement on the expiry of a notice given by him to the other party of his intention to terminate the agreement and Section 63(4) provides that the length of the notice, which can be either verbal or written, shall be a minimum of 30 days. It did not contain any provision regarding payment of any indemnity in case of termination of the contract at the initiative of the employer. There is in the contract no provision for the payment of an indemnity or severance allowance more favourable to the employee to exclude the application of the provisions of the Workers' Rights Act 2019, as amended. Does that mean that in application of the contract the fact that the employer has given the notice of one month it can terminate the employment of a worker without the payment of any severance allowance?

It follows that any inconsistency with the Workers' Rights Act 2019, as amended or provision more restrictive to the employee in an agreement should not be allowed to stand as against public order. **Article 6 of the Code Civil** expressly provides*« On ne peut déroger par des conventions particulières aux lois qui intéressent l'ordre public et les bonnes mœurs. »*and as succcinctly explained in the cases of **Harel Frères Ltd. v. Veerasamy and Anor [1968 MR 218] and Mauritius Steam Navigation Co. Ltd. v. Roussety [1977 MR 25]** the provisions of the law are *"aimed at depriving the employer of the right which he had at common law of terminating the employment of his worker at any time and* ***for no reason, simply by giving him appropriate notice.*** *The Ordinance… instituted the severance allowance as a form of compensation to workers for the termination of their employment…"* (emphasis added) [see also **Introduction au Droit du Travail Mauricien, Les relations industrielles de travail, D. Fokkan, 2ème édition, p.341**].

At this very juncture, it is also worth noting that a notice of termination (préavis de licenciement) and the payment of a severance allowance (indemnité de licenciement) have different juridical nature (nature juridique) which should not be confused: *« La nature juridique de l'indemnité de licenciement est très attractive car* ***opposée à celle du préavis*** *: L'indemnité de licenciement légale ou conventionnelle ne constitue pas un salaire différé ou*

capitalisé, mais une indemnité forfaitaire compensatrice du préjudice subi par le salarié du fait de la rupture. Elle suit donc le même régime que les dommages-intérêts. » **(Droit du travail droit vivant, 16e Edition, Jean-Emmanuel Ray, p. 430, note 314).**

In **De La Haye v Air Mauritius Ltd [2016 PRV 88],** the Privy Council had this to say: *"The Board is satisfied that the notice sent by the defendant to the plaintiff was a termination by it of his contract. The fact that it was a termination permitted by the freely agreed terms of the contract does not alter the fact that it brought the contract to an end, nor that it was undertaken by one party only. The Supreme Court fell into error in holding that what happened was not a unilateral act of the defendant. It was indeed a unilateral act, and the fact that it was anticipated and permitted by the contract does not make it any the less so. Subject to meeting the other requirements of section 46, therefore, this termination was perfectly capable of triggering entitlement to severance allowance.*

The Board cannot accept Mr Ithier's argument that because the giving of notice was envisaged by the freely agreed contract, that by itself either excluded the provisions of section 46 or meant that the termination was automatically justified for the purposes of that section. If that were so, most of the provisions of section 46 for the payment of severance allowance in the event of a termination on prohibited grounds would be wholly ineffective in the case of fixed term or indeterminate contracts containing provisions for termination on notice. An employer could, for example, give notice of termination on the grounds of an employee's race, colour or pregnancy, even though termination on such grounds is prohibited by section 38(1), and avoid the obligation to pay severance allowance. Similarly, the protection for workers against dismissal for misconduct unless the safeguards required by section 38(2) are satisfied would simply be circumvented".

(3) <u>Quittance</u>

- La "quittance" est l'écrit par lequel un créancier déclare qu'il a perçu de son débiteur une somme d'argent en paiement de tout ou partie de la dette dont ce dernier était redevable. Elle consacre la libération du débiteur à due concurrence des sommes qu'il a versées au créancier. Au plan matériel, la quittance peut résulter d'une mention figurant sur le titre même qui établit l'existence et le montant de la dette.

https://www.dictionnaire-juridique.com/definition/quittance.php

- Attestation écrite reconnaissant le paiement d'une somme due (dette, redevance, droit).

https://www.cnrtl.fr/definition/quittance

In **Padaruth, Ramkelawon and Ors vs. Cogefar Construzioni Generali Farsura SPA [1986 MR 91]**, *"Evidencewas adduced to the effect that in 1983 the company intending to reduce its labour force applied to the Minister, who referred the matter to the Termination of Contracts of Service Board. Before the Board the workers complained that they had been made to sign "certain forms" in full satisfaction. To which the representative of the company replied that irrespective of what the workers had already signed, they could always claim for anything to which they were entitled". ……..*

…….. "I agree that the learned Magistrate's ruling was bad for being premature. If an employer relies for his defence on a document signed by his employee in "full satisfaction", it is the Magistrate's duty, first of all, to ascertain what was the parties' intention at the time the document was signed.

I will quote from Traité de Droit du TravailG H Camerlynck -paragraph 256 page 479

"Admettant une interprétation restrictive, fondée notammentsur le principe que la renonciation ne se présume pas, la Cour de cessation declare, suivant une formule devenue de style que 'le reçu pour solde de tout compte n'a d'effet libératoire pour 1'employeur qu'à 1'égard des é1éments de rémunération, salaires, indemnités et advantages spéciaux dont le paiement a été envisagé au moment du règlement de compte'."".

It is worth noting that our highest court refers to "*Quittance*" as being a receipt: *....."Despite having delivered this letter, the respondent actually attended the meeting, in the course of which he was offered a cheque for the compensationand asked to sign a receipt (quittance)……"*- **Coprim Ltée v. Yves Menagé [2008 UKPC 12]**.

In **Kasa Textile & Co Ltd v. Chuke Yin Lam Tze Ting [2005 SCJ 228]**, the Supreme Court referred to "*Quittance*" as being a receipt.

We have been stressing on this definition of "*Quittance*" as being opposed to an agreement. The Respondent has strenuously argued that the signing of the "*Quittance*" by the Applicant equals to an agreement to put an end to a present contract. We beg to differ.

Applicant earns Rs 120,000 as basic salary monthly and thus she does not fall within the definition of worker under the Workers' Rights Act 2019 (as amended). Hence, Section 16 of the Act which deals specifically with '*compromise agreement*' cannot find its application. Nor is there any suggestion that the "*Quittance*" should be considered as a '*transaction*' under our Civil Code as it does not meet the statutory requisite of a transaction in law under Article 2044 of the Civil Code.

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

Article 2044 of the Civil Code reads as follows: -

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

In the encyclopédie de Droit Civil, Dalloz: Vo. Transaction – we read the following: - "5. Selon la majorité de la doctrine, trois éléments sont nécessaires à l'existence d'une transaction :

1. Une situation litigieuse

2. L'intention des parties d'y mettre fin

3. Des concessions réciproque consenties dans ce dessin... »

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

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

***Note 13**: Situation litigieuse – La nécessité d'une situation litigieuse, contestation née ou a naitre, résulte de la définition même de la transaction donnée par l'article 2044 de code civil : le contrat par lequel les parties terminent ou préviennent une contestation.*

***Note 14**: Difficulté contentieuse ou simple incertitude ? – Il convient de noter que cette conception se différencie de celle retenue par le droit romain. Le terme de transaction recouvre alors, non seulement le contrat mettant fin à un litige, mais encore toute convention par laquelle les parties entendent éliminer une incertitude existant dans leurs relations juridiques, même s'il n'existe entre elles aucune difficulté contentieuse ».*

On the second element, the Professor wrote at note 60 that:

L'intention des parties de mettre fin à un litige – ou de le prévenir – est parfois présentée comme le troisième élément nécessaire a la qualification du contrat de transaction. Quoique la question se soit rarement posée en jurisprudence, elle est d'importance capital, car il est bien certain que si cette intention fait défaut, l'accord intervenu entre les parties n'est pas une transaction ».

On the third element the following is what the Professor has noted:

Le mot concession implique, de la part de celui qui y consent, une renonciation a une partie de ce qu'il prétend être son droit. Néanmoins, on peut donner à la proposition un sens positif et admettre, a titre de concession, une prestation extérieure au litige, la 13 souscription d'une obligation nouvelle. Cette possibilité est conforme au sens originaire de la notion ».

Article 2052 of the Code Civil provides*:*

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

Elles ne peuvent être attaquées pour cause d'erreur de droit, ni pour cause de lésion » **- Mr I Boodhun and Medine Ltd (RB/RN/154/2020)**''.

Another important observation regarding the present "*Quittance*" is that the Applicant has neither renounced her rights to further claims,*"la renonciation ne se présume pas",*nor held that the Respondent has been discharged from all responsibilities and obligations under the contract of employment. The "*Quittance*" is simply and purely an acknowledgement of receipt of a certain sum of money paid to her upon termination of her employment by the Respondent.

CONCLUSION

The Applicant who was employed on a contract of indeterminate nature had same terminated unilaterally by the employer during the prescribed period (GN No. 168 of 2022). The Respondent being in breach of Section 72(1), (1A) and (5) of the Workers' Rights Act 2019, as amended, is liable to pay to Applicant severance allowance at the rate specified in Section 70 (1) of the Act (supra) for unjustified dismissal.

We note that the sum claimed by the Applicant in her statement of case may not be the correct one. The Respondent is duty bound to effect payment of severance allowance in accordance with the law- **Stella Insurance Co Ltd v. Ramphul [1987 MR 151]**.

The Board orders accordingly.

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Mr. Rashid Hossen

(President)

SD

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Mr. Christ Paddia

(*Member*)

SD

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Ms. Saveetah Deerpaul

(Member)

SD

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Ms. Yashwinee Chooraman

(Member)

SD

……....

Mrs. Shirine Jeetoo

(Member)

SD

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Mr. Suraj Ray

(*Member*)

SD

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Mr. Feroze Acharauz

(Member)

Date: 30th August 2022