



Guide to Employment Law in Mauritius

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PREFACE

This is the First Edition of the Guide, which we have produced for the information of our clients and professional colleagues. This edition takes account of changes brought about by the coming into force of the Employment Rights Act 2008 on 02 February 2009 and the repeal thereof of the Labour Act 1975 and Section 20 of the Industrial Expansion Act.

This Guide is divided into four parts:

- A. Introduction
- B. The Non Negotiable Elements
- C. The Negotiable Elements
- D. The New Features

This Guide is concerned primarily at providing general information for parties wishing to understand the basic tenets of Mauritian employment law with particular emphasis on the changes brought about by the Employment Rights Act 2008.

It is anticipated that this Guide will not completely answer detailed questions which clients and their advisers may have. The Guide is, therefore, designed as a starting-point for a more detailed and comprehensive discussion of the issues, and should not be used as a substitute for professional advice. Whilst we have made every effort to ensure the accuracy of the statements made herein, we accept no liability for any errors. In all cases expert legal advice from a qualified practitioner of Mauritius law should be obtained.

Before proceeding with any matter discussed herein, persons are advised to consult their legal advisors.

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A. INTRODUCTION

The Employment Rights Act 2008 (the “Act”) came into force on 02 February 2009. The Act was introduced at a crucial time in the history of employment law in Mauritius inasmuch as until its advent, the laws of employment were governed predominantly by the Labour Act 1975 (the “old law”) and other pieces of legislation that were not enabling in nature and in respect of which the old law was the ‘feeder’ piece of legislation.

Over the years it was felt that the changes that were made to the old law were not sufficiently consonant with the needs of the modern employment environment in Mauritius that now accommodates a substantial percentage of foreign workers at all levels of the work stratum.

Whilst it cannot be said that in repealing the old law, the Act has revolutionised the existing employment law structure in Mauritius, it is apposite to mention that it has achieved a two-fold result. First, the Act has consolidated the old law and contracts of employment. Second, it has endorsed concepts that are now accepted as intrinsic to most modern employment law régimes. Accordingly, it has opened the doors for the possibility to negotiate a well defined group of elements forming the essence of the contract of employment (under the old law the latter elements were well engraved in ‘tablets of stone’).

The Act therefore marks the beginning of a new era in approach to the principles underpinning the employment laws of Mauritius.

B. THE NON-NEGOTIABLE ELEMENTS

1. Discrimination in employment and remuneration

As a novelty to our employment law, “discrimination” is expressly defined and prohibited under the Act. Further, the definition is comprehensive and thus comprises “different treatment to different workers attributable wholly or mainly to their respective descriptions by age, race, colour, caste, creed, sex, sexual orientation, HIV status, religion, political opinion, place of origin, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation” (see §4(5)(a) of the Act).

2. Equal remuneration for work of equal value

The Act imposes a positive duty on every employer to ensure that the “remuneration” of any worker “shall not be less favourable than that of another worker performing the same type of work” (see §20 of the Act).

The Act has gone a step further than the old law as it has actually defined the term “remuneration” as comprising “all emoluments, in cash or in kind, earned by a worker under an agreement”. It captures: (a) any sum paid by the employer to a worker to cover expenses incurred in relation to the special nature of his work; (b) any money to be paid to a job contractor, for work, by the person employing the job contractor; and (c) any money due as a share of profits (see §2 of the Act).

3. Maternity Benefits

A female worker is entitled to twelve weeks’ maternity leave on full pay provided, for the purposes of payment, she has been in the continuous employment of the employer for a period of twelve consecutive months immediately preceding the beginning of leave and she has produced a medical certificate (see §30 of the Act).

Under the Act, a female worker who is in part-time employment will be entitled to be paid in accordance with the formula set out under the Act, provided she fulfills the above requirements that apply to a (full-time) female worker i.e. continuous employment and production of a medical certificate.

It is to be noted that under the Act a female worker who fails the requirement to be in twelve months continuous employment prior to leave is still entitled to maternity leave, but she is not entitled to pay.

The Act goes further than the old law as it covers for the loophole under the old law as regards the entitlement to maternity leave where the new born is still born or the female worker suffers a miscarriage. Thus, where the female worker who fulfills the test for continuous employment gives birth to a still born child, she is entitled to a maximum of twelve weeks leave. The only condition precedent to her entitlement is that she must produce a medical certificate confirming the need for leave. In the event of a miscarriage that is duly certified by a medical practitioner the female worker is entitled to two weeks’ leave on full pay immediately after the miscarriage.

4. Paternity Leave

The Act legitimates the rights of a father of a new born child to take five continuous days off work following the birth of his child (see §31 of the Act). Under the old law, this could be achieved by applying for ‘local leaves’; however, in this respect, the Act is innovative as it enhances the image of a father within the family unit but it retains a conservative aspect in that ‘common law’ fathers are disentitled to paternity leave under the Act.

In order to be granted paternity leave, the following conditions must be satisfied by the father: first, the father must produce a medical certificate to confirm the birth of the new born child by his spouse; and second, he must produce a written statement signed by him to the effect that he is living with his spouse under a common roof. Pursuant to the Act, paternity leave must begin within one week from the birth of the child and will be on full pay provided the father has been in continuous employment with the same employer for a period of at least 12 months prior to the date of birth of the child.

Under the Act the meaning of “spouse” is limited to marriage whether religious or civil (see §31(3) of the Act). Thus, a common law husband cannot avail himself of paternity leave under the Act.

5. Termination of Agreement

(a) Requirement to Issue a Notice of Termination

Under the old law, an employer who intended to terminate the employment of a worker who had reckoned a year or more continuous service with the employer had defined time-frames during which the employer had to notify a worker of his intention to terminate the worker’s contract. The time-frame varied according to the number of years of service the worker reckoned with the employer.

The Act, however, has created a standard procedure that applies to all employees, irrespective of the time served with their employer. The governing provision in the Act is that an employer must give a worker thirty days’ notice of his intention to terminate the contract of employment (see §37(4) of the Act), or within “any [longer] reasonable time” (see §37(3) of the Act). The notice period provided in the Act is subject, however, to any provision in the contract of employment. Notice may be in verbal or written form.

(b) Payment in Lieu of Notice

The Act has maintained the rights under the old law by which an employer is authorised to pay to the worker a sum that represents the remuneration that the worker would have been paid had s/he been in the employment of the employer during the period that constitutes the ‘notice period’ (see §37(5) of the Act).

(c) Protection against Termination under Specific Circumstances

The Act sets out a number of instances which prevent termination of employment by reason of, for example, race, colour, political opinion or sexual orientation, absence during maternity leave, absence through illness when accompanied by a medical certificate, membership to a trade union or because of a complaint filed against the employer (see §38(1) of the Act for a full list of prohibited reasons for termination).

(d) Rights of Worker under a Notice of Termination

An employer, having issued a worker with a notice of termination of employment must, on satisfactory proof of a request, authorise a worker reasonable time-off in order to seek further employment (see §39 of the Act).

6. The Workfare Programme

The Government of Mauritius (the “Government”) has introduced this feature to Mauritius to sustain levels of employment and to improve quality of services and industry (see Part IX of the Act). Under the Act, the Government will grant a Transition Unemployment Benefit to every worker whose agreement has been

terminated and who has joined the Workfare Programme, which will be paid for a minimum period of one month and a maximum period of twelve months.

The rate at which such benefit will be paid is set out in the Thirteenth Schedule to the Act, and is computed on the basis of the basic wage of the worker as follows:

- 90% of the basic wage for the first three months;
- 60% of the basic wage for the next three months; and
- 30% of the basic wage for the remaining six months.

Where a worker registers himself in the Workfare Programme, he must, within 7 days, opt for any of the activities under section 41(2)(b) of the Act, namely, job placement, training and re-skilling or starting up a small business. The Permanent Secretary of the Ministry responsible for the subject of labour and employment relations will then refer the worker, as the case may be, to either the Employment Service Ministry (for job placement), the Human Resource Development Council (for training and re-skilling) or the Small Enterprises and Handicraft Development Authority (for starting up small businesses).

The Act specifically provides for the financing of the Transition Unemployment Benefit from two sources: first, from one per cent contribution of the worker and the recycling fee in the National Savings Fund account of the worker and any interests accrued thereon, to the level of fifty per cent of the Transition Unemployment Benefit; and second, from the Workfare Programme Fund to the level of fifty per cent of the Transition Unemployment Benefit (see Seventh Schedule of the Act).

7. Compensation

i.e. the payment of 'severance allowance', 'recycling fee' as defined and in the terms set out under the Act, the payment of the gratuity fee upon retirement, the payment of the death grant, the issue of the Certificate of Employment, the payment of gratuity to a worker under a fixed term employment contract.

Severance Allowance

The computation of the figure varies according to the number of years of continuous service that the worker reckons with the employer. However the Act is unequivocal as regards the figure to be used for computation purposes namely the remuneration payable to a worker at the time of termination of his or her agreement (see §46 of the Act).

Thus, where the worker reckons continuous employment the computation is as follows (see §46(5) of the Act):

- (a) for every period of 12 months, the sum paid represents the equivalent of 3 months' remuneration for every period of 12 months of employment with the employer; and
- (b) for every period less than 12 months, the sum paid is 1/12 of the sum mentioned at (a) above multiplied by the number of months during which the worker has been in the continuous employment of the employer.

The Act permits an employer make certain deductions from the Severance Allowance payable to a worker (see §48 of the Act). These are as follows:

- any gratuity granted by the employer;
- any contribution made to any fund or scheme by the employer; and
- any recycling fee paid under the Act

Recycling Fee

See below at New Features at Section D.

Gratuity at Retirement

In well defined circumstances the Act makes it mandatory on an employer to pay a gratuity to a worker who has been in his or her continuous employment for 12 months or more. The aforesaid gratuity is payable as a lump sum (see §49 of the Act).

The following are the three types of situations that are captured by this requirement to pay the aforementioned gratuity:

- (a) where the worker has retired voluntarily at the age of 60;
- (b) where the worker has retired before the age of 60 on grounds of permanent incapacity to perform his or her work that has been certified by a government medical practitioner. In order that the worker becomes entitled to gratuity under this heading, the worker must reckon not less than ten years continuous employment with the same employer; and
- (c) where the worker has retired at the request of the employer either on or after attaining the retirement age.

The Act prescribes a formula for the computation of the lump sum and permits deductions to be made from the lump sum due by the employer to his or her worker (see §49(2) & §49(3) of the Act).

Payment of Death Grant

See below under New Features at Section D.

Certificate of Employment

See below under New Features at Section D.

Payment of Gratuity under a Fixed Loan Contract

The Act extends the payment of the aforesaid gratuity to a contractual worker where the worker is employed on a contract of determinate duration that ends before 31 December of any year. This entitlement prevails notwithstanding the terms of his contract or any relevant piece of legislation, if any (see §53 of the Act).

Thus, gratuity is payable by the employer that represents 1/12 of the earnings of the worker in a relevant year.

However in order that the worker is eligible, the worker must have performed a number of normal days' work equivalent to not less than 80% of the number of working days during his or her employment in that year.

Violence at Work

The meaning of 'violence' under the Act comprises an exhaustive set of circumstances that will constitute 'violence' at work whilst a worker is at work. Violence at work is an offence that attracts both criminal and civil liabilities under the Act (see §54 of the Act).

The types of behaviour that are captured under the Act are set out below namely:

- (a) harassment (sexual or otherwise);
- (b) assault;
- (c) verbal abuse, swearing, insulting;
- (d) express the intention to cause harm;
- (e) bully or use threatening behaviour;
- (f) use aggressive gesture indicating intimidation, contempt or disdain; and
- (g) hinder (verbally or in the behaviour) a worker during the course of his work.

It is apposite to mention that the legislator has actually expounded on the scope of 'sexual harassment' under the Act. The yardstick to assess whether there has been sexual harassment at work is that of the reasonable man i.e. whether the circumstances are those wherein a reasonable man would have foreseen that the worker would be humiliated, offended or intimidated where there was either an unwelcome sexual advance or an unwelcome request for a sexual favour or there was an unwelcome conduct of a sexual nature towards the worker (see §54(3) of the Act).

It is also worthy of note that the legislator has defined the term 'harassment' namely "any unwanted conduct, verbal, non-verbal, visual, psychological or physical, based on age, disability, HIV status, domestic circumstances, sexual orientation, race, colour, language, religion, political, trade union or other opinion or belief, national or social origin, association with a minority, birth or other status" that a reasonable person would have foreseen that a worker would be affected negatively in his dignity (see §2 of the Act).

C. THE NEGOTIABLE ELEMENTS

Normal Working Hours

The normal day's work of a worker other than a part-time worker or a watch person consists of eight hours daily or a maximum of ninety hours a day (see §14 of the Act).

The normal day may start on any day of the week, whether or not a public holiday.

The Act goes further and recognises as valid an agreement between an employer and a full-time worker wherein the worker agrees to work over and above the normal eight hours' rate and without any extra remuneration for the excess hours but provided that the number of hours worked by a worker does not exceed the maximum of ninety hours in a fortnight.

Overtime

The general principle is that a worker is to be given a 24-hour notice before s/he undertakes overtime work (see §16 of the Act).

For the purposes of computation, overtime denotes work completed by a worker who has completed the maximum number of ninety hours in a fortnight. The applicable rate for overtime hours per fortnight is 1.5 normal rate.

In the event that the overtime hours are undertaken on Sundays or on public holidays the rate of overtime is twice the hourly rate for every hour of overtime undertaken.

Public Holidays

A worker is entitled to a full day's pay in respect of a public holiday, other than a Sunday, during which s/he would not have had to work provided s/he reckons twelve months' continuous employment with the employer (see §17 of the Act).

The Act recognises as valid an agreement that declares that the remuneration comprises payment for work on public holidays and for work in excess of the agreed hours of work. However, the Act requires that such an agreement must state (a) the maximum number of public holidays and (b) the maximum number of hours of overtime on a day not being a public holiday.

Meal & Tea Breaks

An employer is required to provide to a worker (a) a daily meal break of one hour not later than four consecutive hours of work and (b) a tea break of at least twenty minutes daily or two tea breaks of at least ten minutes each daily. However these may be agreed otherwise by the employer and the worker (see §18 of the Act).

Meal Allowances

Under the Act a worker who remains at work after the normal working hours is now entitled to either an 'adequate free meal' or be paid a meal allowance of MUR 50 daily [USD 2] (see §19 of the Act).

It is to be noted that this employer's duty will arise where the worker has worked either (a) for a period of at least two hours and up to 18:00 hours or (b) for less than two hours but up to 19:00 hours is now entitled to a Meal Allowance in the terms set out therein.

A female worker is entitled to the payment of a maternity allowance in the order of Mur 2, 000 [USD 67].

Payment of remuneration in Special Circumstances

In specific circumstances an employer is required to pay a worker a full day's remuneration. First, where the employer is unable to provide work to the worker. Second, where work has stopped after the worker has worked for more than two hours because of climatic conditions, power failure or a breakdown in machinery or appliances (see §24 of the Act).

However a worker will be entitled to only half a day's remuneration where work has been stopped before the worker has completed two hours or where the employer has taken the view that no work can be performed owing to climatic conditions, power failure or breakdown in machinery or appliances.

Transport of Workers

An employer must refund bus fares to a worker where the distance between the worker's place of residence and place of work exceeds three kilometres (see §26 of the Act).

Annual Leave (also called the 'Local leave')

The Act has maintained the number of Annual leaves available to a worker who reckons twelve months of continuous service with the employer. Thus a worker is entitled to twenty days fully paid leave for each period of twelve months. The computation of one day's leave is made according to a formula set out in the Act (see §27 of the Act).

Any un-used Annual leaves in a period of twelve months are refunded, the latter being computed using the formula prescribed under the Act for one full day's pay

Sick Leave

The Act has reduced the number of days under the old law. Thus a worker who reckons twelve months of continuous service with an employer is now entitled to fifteen days of sick leave instead of twenty-one days (see §28 of the Act).

However the novelty under the Act is that a worker is entitled to accumulate up to a maximum, of ninety days of sick leave in a period of twelve months.

D. THE NEW FEATURES

The new features are set out below:

The definition of ‘worker’

Under the Act a ‘worker’ is a person whose wages does not exceed the sum of MUR 360, 000 annually [USD 12, 000] (see §2 of the Act).

The phrase ‘basic wage or salary’ is defined exhaustively under the Act as all the emoluments received by the worker, excluding any bonus or overtime (see §40(a) of the Act).

Written Particulars of Work Agreement

The Act casts a positive duty on every employer who employs more than 10 workers to provide every worker engaged for more than one month with a written statement of particulars of employment in the form prescribed under the Act. The aforesaid written particulars must be provided to the worker within a period of two weeks of entering into an agreement (see §8 of the Act).

Certificate of Employment

The Act imposes a duty on every employer who has terminated the employment of a worker to issue the worker with a Certificate of Employment in the form prescribed under the Act. The delay for issuing the Certificate of Employment is a period of seven days within the termination of employment (see §51 of the Act).

The ‘recycling fee’

Under the Act, a ‘recycling fee’ is payable to a worker whose employment has been terminated by the employer. The rate of the recycling fee is laid down by the Act. The recycling fee is to be paid not later than a period of thirty days from the date of termination of employment. It is to be noted that the recycling fee is not paid directly to the worker but to the National Pensions Fund (‘NPF’) that is managed by the Government of Mauritius. Upon receipt of the recycling fee the NPF is required under the Act to credit the same to another fund managed exclusively by the Government of Mauritius (see §47 of the Act).

However no recycling fee is to be paid to the NPF in three specific set of circumstances namely:

- (a) where the employer is and the worker is employed or offered employment by the personal representative or the heir of the deceased employer after the death of the employer;
- (b) the partnership that employed is dissolved and the worker is offered employment by the member of the dissolved partnership or a new partnership forthwith after the dissolution of the partnership;
- (c) a worker’s employment by a body corporate ceases on the dissolution of the body corporate and the worker is offered employment by another corporate body pursuant to a scheme of reconstruction forthwith after the dissolution of the body corporate;
- (d) the worker’s employment ceases on the disposal of the goodwill of the employer or of a substantial part of the business of the employer in which the worker is employed and the worker is offered employment by the person who acquired the goodwill or business or part of the business forthwith after the disposal of the goodwill.

Violence and Harassment at work

See above at Non Negotiable Elements at Section B.

Paternity Leave

See above at Non Negotiable Elements at Section B.

Death Grant

The Act provides that an employer shall pay a death grant of the order of MUR 3, 500 [USD 117] to the spouse of a worker who has passed away whilst in the employment of the employer and who reckons twelve months of continuous employment with the employer (see §50 of the Act).

A 'spouse' for these purposes means a person having contracted a religious or civil marriage with the deceased worker (see § 50(2) of the Act).

In order to be entitled to the death grant the spouse must produce a written statement declaring that s/he was living with the deceased worker under a common roof at the time of death. In the event that the deceased worker does not have a spouse the death grant is payable to the person who establishes that s/he met the funeral expenses of the deceased worker.

Workfare Programme

See above under Non Negotiable Elements at Section B.

The Employment Relations Tribunal

The Act validates the establishment of the Employment Relations Tribunal set up by another piece of legislation namely the Employment Relations Act 2008. However it remains silent on the mode of operation of the Employment Relations Tribunal (see §2 of the Act).

For more specific advice on Employment Law in Mauritius, we invite you to contact one of the following:

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