The present labour dispute has been referred to the Employment Relations Tribunal (the "Tribunal") pursuant to section 69 (7) of the Employment Relations Act 2008 (the "Act") on the following terms:

1. Whether my transfer as from Cassis Garage to Stand Victoria at Port Louis is unfair and tantamount to a punitive transfer.

2. Whether I should be transferred to my previous position at Cassis Garage.”

Both parties are represented by Counsel in the matter and the Respondent has, in its statement of case, raised a preliminary objection in relation to the jurisdiction of the Tribunal to hear the present labour dispute, as follows:

The Respondent avers that by virtue of the provisions of Section 71 (b) of the Employment Relations Act, the Employment Relations Tribunal has no jurisdiction to enquire into this alleged labour dispute since this alleged dispute
relates to an issue which is the subject of pending proceedings before a court of law, a copy of which is herewith annexed.

A second objection in relation to jurisdiction has also been taken by the Respondent *quo ad* the referral of the present labour dispute by the *Commission for Conciliation and Mediation* (the “*Commission*”) pursuant to *section 69 (7)* of the *Act* in a letter dated 18th August 2011 (the “*referral letter*”) from the *Commission* addressed to the *Tribunal*.

The Disputant objected to the two points raised and the matter was fixed for arguments.

Counsel for the Respondent first submitted on the objection taken to the referral of the present matter from the *Commission* to the *Tribunal*, essentially stating that under *section 69 (7)* of the *Act*, the *Commission* has two avenues available to it. The first avenue is for the *Commission* to decide on the facts and circumstances of the dispute in which case the matter stops there. Under the second avenue, the *Commission* has a discretion to refer the matter to the *Tribunal* and once the *Commission* has exercised this discretion, the question of consent of the worker comes into play. He has gone on to submit that the *Commission* has misconstrued the law in acceding to a request made by the Disputant for the matter to be referred to the *Tribunal* (vide the “*referral letter*”) and that the jurisdiction of the *Tribunal* has not been properly seized in this matter.

On the objection raised pursuant to *section 71 (b)* of the *Act*, Counsel for the Respondent has relied on a provisional information lodged before the *District Court of Port Louis (South)* which is annexed to the Respondent’s statement of case, under which one Mr Fazil Maderbocus is charged with the offence of sexual harassment upon a complaint by Miss Bibi Shenaz Annaruth. Counsel has stated that the Disputant (in her statement of case) has averred that the transfer relates to an allegation of sexual harassment which she reported against a fellow employee of the Respondent (i.e. Mr Fazil Modabacus, an Assistant Traffic Manager). The Disputant contends that the decision of the Respondent to transfer her is punitive in nature. He submitted that the allegation of sexual harassment forms the very basis of the application which is before the *Tribunal* and that the alleged punitive transfer cannot be looked in isolation and must be viewed in its context, which has been given by the Disputant herself. Counsel also further submitted that *section 71 (b)* of the *Act* is of a mandatory nature which does not leave the *Tribunal* with any room for discretion and that the jurisdiction of the *Tribunal* is specifically excluded.

Counsel for the Disputant, in relation to the preliminary objection raised under *section 71 (b)* of the *Act*, has in reply stated that the law refers to, and is restricted to, labour disputes which does not extend to the issue of a criminal offence, which is what the charge under the provisional information is. In his submission, the labour dispute itself has no bearing on the sexual harassment case. Although, Counsel has not disputed that the
Disputant has averred the complaint (relating to the provisional charge) in her statement of case, it is a completely different matter which has been reported to the Police, who have decided to lodge an independent case against the preposé of the Respondent. Counsel also went onto submit that the matter has been rightly referred by the Commission to the Tribunal (inasmuch as the matter is a labour dispute).

The present labour dispute has been referred to the Tribunal via a referral letter dated 18th August 2011 from the Commission. The body of the letter reads as follows:

“On 31 May 2011, Mrs Bibi Schenaze Annaruth reported to the President of the Commission, the existence of a labour dispute between herself and the United Bus Service Ltd.

Conciliation meetings were held at the Commission and no settlement has been possible. Mrs Bibi Schenaze Annaruth requested the Commission to refer the dispute to the Employment Relations Tribunal for arbitration.

The Commission is, therefore, referring the labour dispute to the Employment Relations Tribunal for arbitration in terms of section 69(7) of the Employment Relations Act 2008 as per enclosed terms of reference.

Parties have been informed accordingly.”

It is apposite to quote from Dr. D. Fok Kan in Introduction au Droit du Travail Mauricien, 1/ Les Relations Individuelles de Travail, 2ème edition (2009), on the functions of the Employment Relations Tribunal (at page 25), namely:

L’une des fonctions de l’ERT est d’agir comme arbitre dans le cadre des litiges industriels qui lui sont référés soit par les parties ou par la Commission for Conciliation and Mediation.

As per the referral letter, it is clear that the present labour dispute has been referred pursuant to section 69 (7) of the Act. This provision reads as follows:

Where no agreement is reached in the case of a labour dispute reported by an individual worker, the Commission may, within 7 days, with the consent of the worker, refer the labour dispute to the Tribunal for arbitration.

The aforesaid provision does not leave any room for any ambiguity with regard to the duty of the Commission when faced with the event provided for in section 69 (7), i.e. where no agreement has been reached in a labour dispute reported by a Disputant. From this eventuality, it follows that the Commission has a discretion within a time limit of 7 days
to refer the labour dispute to the *Tribunal* for arbitration, provided that it has the consent of the Disputant as has been expressly provided for in section 69 (7) of the *Act*.

From a perusal of the *referral letter*, it appears that it is at the request of the Disputant that the matter has been referred to the *Tribunal* for arbitration, although the *Commission* has gone on to state that it is therefore referring the labour dispute to the *Tribunal* for arbitration in terms of section 69 (7) of the *Act*.

The *Tribunal* in its Award in *B. Rungee (Mrs) and The Municipal Council of Quatre Bornes* [ERT/RN 64/10] drew the attention of the *Commission* to the provisions of section 69 (7) on the following terms:

*It was not for Mrs B. Rungee to request the Commission to refer the dispute to the Employment Relations Tribunal for arbitration. Since no agreement had been reached, the Commission has a discretion, which is to be exercised judiciously, to refer the dispute to the Tribunal with the consent of the worker. (Vide Award of L. Saleegram and New Educational College, i.p.o. Private Secondary School Authority [RN 22/10]).*

In the latter Award, the *Tribunal* in relation to the referral of the dispute before it stated:

*Indeed the Commission has a discretion which is to be exercised judiciously and after considering all the issues and having failed to conciliate the parties and with the consent of the individual worker it refers the matter for arbitration.*

It is therefore clear that in referring the present dispute at the request of the Disputant as has been stated in the *referral letter*, the *Commission* has misinterpreted the provisions of section 69 (7) of the *Act*. The referral cannot therefore be held to be a valid one under the *Act*.

With regard to the preliminary objection raised by the Respondent pursuant to section 71 (b) of the *Act*, *quo ad* to the jurisdiction of the *Tribunal*, it may be noted that the aforementioned section reads as follows:

**71. Exclusion of jurisdiction of Tribunal**

The *Tribunal* shall not enquire into any labour dispute where the dispute relates to any issue –

(a) ...;

(b) which is the subject of pending proceedings before the Commission or any court of law.
It is common ground that the present dispute is on the issue of whether the transfer of the Disputant is unfair and tantamount to a punitive transfer (vide the terms of reference). It has not been disputed that the Disputant has given a declaration to the Police against the Assistant Traffic Manager and a provisional information has been lodged against the latter before the District Court of Port Louis (South). It has been stated in the provisional information that the sexual harassment complained of has been since 1995. In her statement of case, she has averred that she has been subjected to several incidents of sexual harassment by the said Assistant Traffic Manager for several years and that this latter has been giving false reports about her to the Traffic Manager. In a letter dated 10.05.2011 (annexed to her statement of case), the Disputant has written to the management of the Respondent, stating why she refuses the transfer to Cassis Garage, inter alia, on the ground that she has denounced a confrère of the employer. A letter dated 28 April 2011 from the Traffic Manager of the Respondent in relation to the transfer is also annexed to the Disputant’s statement of case.

It is apposite to note what was stated in relation to a provisional information in *DPP v Indian Ocean International Bank & anor.* [1989 MR 38] namely:

No detainee pleads to a provisional information and no trial takes place. Consequently no question arises as to whether evidence is required to be given in those proceedings. When the need arises for evidence to be given, the provisional information is simply struck out and an information is lodged to which the accused pleads and in respect of which a trial takes place.

However, it must be borne in mind that ex facie the terms of reference of the present labour dispute, there is no mention of the Assistant Traffic Manager nor of any case that has been reported against him by the Disputant in relation to the alleged punitive transfer.

Although the Disputant has put forward as a reason that she has denounced a confrère (who is presumably the Assistant Traffic Manager of the Respondent) and that Counsel for the Respondent has submitted that the transfer must be looked at in its context, the Tribunal would need to hear evidence on the matter to enable it to ascertain whether there is a link between the alleged punitive transfer and the complaint of sexual harassment made by the Disputant to the Police and that this has led to the provisional information. Only then can the Tribunal safely come to the conclusion that the dispute relates to any issue which is the subject of pending proceedings before a court of law.

The Tribunal upon the referral of a labour dispute is empowered to enquire into the dispute and make an award thereon. Furthermore, one cannot overlook what has been stated in *Baccus v The Permanent Arbitration Tribunal* [1986 MR 272] in relation to the terms of reference of a dispute, namely:
... one must in order to decide whether the order complained of was ultra petita or not look at the terms of reference of the dispute.

An award of the Permanent Arbitration Tribunal which goes outside the terms of reference will be ultra petita and may be quashed just as any other award.

The Tribunal cannot thus at this stage, in relation to the objection taken under section 71 (b) of the Act, pronounce itself on whether it has no jurisdiction to enquire into the labour dispute for the reason that the dispute relates to an issue which is the subject of pending proceedings before a court of law.

In the circumstances, in view of the flawed nature of the referral of the present labour dispute by the Commission to the Tribunal, the matter is set aside (vide P. Greedharee and Mauritius Port Authority & anor. [ERT/RN 258/11]).

(Sd) Shameer Janhangeer  
(Vice-President)

(Sd) Kumaraswamy Venkatashawmy  
(Member)

(Sd) Jheenarainsing Soobagrah  
(Member)

(Sd) Maurice Christian Aimé Laurette  
(Member)

Date: 1st December 2011