

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 97/20

Before

Indiren Sivaramen	Acting President
Francis Supparayen	Member
Karen K. Veerapen	Member
Arassen Kallee	Member

In the matter of:-

Mr Shavindra Dinoo Sunassee (Disputant)

And

Airports of Mauritius Co Ltd (Respondent)

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 70(4) of the Employment Relations Act, as amended (hereinafter referred to as “the Act”). The parties were assisted by Counsel. The terms of reference of the points in dispute read as follows:

“Whether I, Sunassee Dinoo Shavindra, President of the Airport of Mauritius Ltd Employees Union and Ex- Airport operations control center operator of the AML, summarily dismissed on the 25th of July 2020, must be re-instated in my post as mentioned above, pursuant to Section 64(1A)(d) and (f) of the Employment Relations Act 2019.”

It is apposite to note that the Respondent has raised a preliminary objection in its Statement of Reply which reads as follows:

1. *The Disputant's present application falls outside the jurisdiction of the Employment Relations Tribunal as set out under section 64(1)(A) of the Employment Relations Act inasmuch as the Disputant's employment was terminated summarily on grounds of gross misconduct and breach of trust following disciplinary proceedings which were initiated against the latter in his capacity as employee of the Respondent.*
2. *The Respondent accordingly moves that the application be dismissed with cost.*

In view of the short delay currently provided by law (following the amendments brought to the Act by The Covid-19 (Miscellaneous Provisions) Act) to determine such a matter, it was agreed that the preliminary objection was going to be taken together with the merits of the case. The Disputant and the representative of the Respondent deponed before the Tribunal and both Counsel offered oral submissions.

The Tribunal has carefully considered all the evidence on record and the submissions of Counsel. The jurisdiction of the Tribunal emanates from the definition of "labour dispute" under section 2 of the Act, as amended and which reads as follows:

"labour dispute" –

(a) means a dispute between a worker, a recognised trade union of workers or a joint negotiating panel, and an employer which relates wholly or mainly to –

(i) the wages, terms and conditions of employment of, promotion of, or allocation of work to, a worker or group of workers;

(ii) the reinstatement of a worker, other than a worker who is appointed by, or under delegated powers by, the Judicial and Legal Service Commission, the Public Service Commission or the Local Government Service Commission –

(A) where the worker is suspended from employment, except where the alleged misconduct of the worker is subject to criminal proceedings; or

(B) where the employment of the worker is terminated on the grounds specified in section 64(1A);

(b)

(c) ...

It is apposite to note that prior to the 2019 amendment to the Act (by Act No. 21 of 2019) “reinstatement” was merely mentioned in the then first paragraph of the definition of “labour dispute” along with other terms such as wages, terms and conditions of employment, promotion or allocation of work. The Act then did not contain any substantive provisions in relation to how or in what circumstances the Tribunal could enquire into a dispute relating wholly or mainly to the reinstatement of a worker. In the case of **Meetoo H.S v Employment Relations Tribunal 2018 SCJ 133**, the Supreme Court, upholding an award of the Tribunal in the case of **Mrs Hemowtee Salaye Meetoo and Mauritius Broadcasting Corporation, ERT/RN 195/15** stated the following:

...

Section 71 (a) of the Employment Relations Act 2008 specifically provides that the Tribunal shall not enquire into any labour dispute where the dispute relates to any issue within the exclusive jurisdiction of the Industrial Court. Section 3 of the Industrial Court Act provides that the Industrial Court has exclusive jurisdiction to try any matter arising out of the enactments specified in the First Schedule to that Act. And the Employment Rights Act is so specified in that Schedule. In that connection, Mr S. Mohamed submitted on behalf of Mrs Meetoo that, whilst the Industrial Court has admittedly sole jurisdiction to deal with cases of unjustified dismissal under the Employments Rights Act, the dispute before the Tribunal was not about unjustified dismissal but about reinstatement. We are unable to accept that contention. The Tribunal could not consider reinstatement without hearing evidence, and making a determination, on the issue of unjustified dismissal, an exercise which would be in breach of Section 3 of the Industrial Court Act.

...

We wish to add something about the inclusion of the word “reinstatement” in the definition of “labour dispute” in the Employment Relations Act 2008. Indeed, “labour dispute” is defined as including a dispute between “a worker and an employer” which relates wholly or mainly to, inter alia, “reinstatement” of a worker. However, as rightly pointed out by the Tribunal in its award, the said Act covers the jurisdiction of the National Remuneration Board and the Commission for Conciliation and Mediation. The mere inclusion of reinstatement as an issue in relation to which there may be a “labour dispute” is insufficient, in the absence of a specific provision of the law, to confer on the Tribunal jurisdiction to deal with the issue of reinstatement following termination of employment in the teeth of sections 71 (a) of the Employment Relations Act 2008 and section 3 of the Industrial Court Act.

The law has since then been amended in 2019 and sections 64(1A) and 70(2A), 70(2B) and 70(2C) now provide as follows:

64(1A) No dispute on the reinstatement of a worker in relation to the termination of his employment shall be reported except where the termination is effected by reason of –

- (a) discrimination on the ground of a worker's race, colour, caste, national extraction, social origin, pregnancy, religion, political opinion, sex, sexual orientation, HIV status, marital status, disability or family responsibilities;*
- (b) a worker being on maternity leave or by reason of the worker's absence for the purpose of nursing her unweaned child;*
- (c) a worker's temporary absence from work because of injury sustained at work or sickness duly notified to the employer and certified by a medical practitioner;*
- (d) a worker becoming or being a member of a trade union, seeking or holding of trade union office, or participating in trade union activities;*
- (e) the worker filing, in good faith, a complaint, or participating in proceedings against an employer involving alleged breach of any terms and conditions of employment; or*
- (f) a worker's exercise of any of the rights provided for in this Act or other enactment, or in such agreement, or collective agreement or award.*

70(2A) (a) Where the Tribunal finds that the claim for reinstatement of a worker in relation to his suspension from work is justified, the Tribunal shall,

subject to the consent of the worker, make an award for the reinstatement of the worker.

(b) The Tribunal shall not make an award for the reinstatement in relation to the suspension from work of a worker where the Tribunal, after having heard the case, is of opinion that the bond of trust between the worker and the employer may have been broken.

(2B) Subject to subsection (2A), where the Tribunal finds that the claim for reinstatement of a worker in relation to the termination of his employment on any of the grounds specified in section 64(1A) is justified, the Tribunal shall –

(a) subject to the consent of the worker; and

(b) where it has reason to believe that the relationship between the employer and the worker has not irretrievably been broken,

make an award for the reinstatement of the worker and, where it deems appropriate, make an order for the payment of remuneration to the worker from the date of the termination to the date of his reinstatement.

(2C) Where the Tribunal does not give an award for the reinstatement of a worker, the worker may institute proceedings before the Court for unjustified termination of employment.

It is an accepted principle that the law must be interpreted in such a way that the legislator is not deemed to have legislated in vain. Also, it is clear in the present case that the intention of Parliament was to give jurisdiction to the Tribunal to enquire into the reinstatement of a worker in certain specific cases. From section 64(1A) (above), the disputes in relation to reinstatement which can be reported have been listed down and the manner in which the section has been drafted indicates that the list is an exhaustive list. Be that as it may, the above provisions will still have to be interpreted in such a manner that there is no conflict among provisions in the same Act or conflict between provisions in the Act and provisions in other pieces of legislation.

Thus, it is appropriate, at this stage, to refer to section 71 of the Act which 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) within the exclusive jurisdiction of the Industrial Court;*
- (b) which is the subject of pending proceedings before the Commission or any court of law.*

Section 3 of the Industrial Court Act reads as follows:

3. Establishment of Industrial Court

There shall be an Industrial Court with exclusive civil and criminal jurisdiction to try any matter arising out of the enactments set out in the First Schedule or of any regulations made under those enactments and with such other jurisdiction as may be conferred upon it by any other enactment. (underlining is ours)

The First Schedule to the Industrial Court Act refers to the Workers' Rights Act 2019 which caters lengthily under its Part VI for 'Termination of Agreement and Reduction of Workforce'. It is important to note that section 70(2C) of the Act provides that where the Tribunal does not give an award for the reinstatement of a worker, the worker may institute proceedings before the Court for unjustified termination of employment.

Clearly, the Tribunal thus cannot consider issues such as the different time frames provided by law under say section 64 of the Workers' Rights Act, amendments pertaining to a charge levelled against a worker and any other issues which arose during and were directly in relation to the disciplinary hearing. These would be matters within the exclusive jurisdiction of the Industrial Court. This would be in line with the statement made by Counsel for Disputant before the Tribunal as follows:

"... I intend to submit along a certain line where the proceedings of the disciplinary committee are, according to me, irrelevant for the determination of this committee [which we understand should be the Tribunal here]. The real issue would be something else in law on which I will submit upon but these facts aren't necessary."

Also, the Tribunal cannot consider previous incidents or events referred to by the Disputant to make any presumptions that the actual charges under consideration which were levelled against Disputant were made in his capacity as President of the union.

What is then the jurisdiction granted to the Tribunal under the Act for disputes which relate wholly or mainly to reinstatement of a worker? The amendments brought to the Act in 2019 provide an indication as to this jurisdiction. Firstly, to be able to report a dispute in relation to the reinstatement of a worker, the termination of the employment must have been by reason of or because of one of the grounds laid down in section 64(1A) of the Act. The legislator in its wisdom has decided that these grounds carry with them something so wrong, which flouts basic principles of fairness, mutual respect and fundamental rights of a worker, that termination of employment on any one of such grounds requires an even greater protection for the worker. Termination of employment on any such grounds warrants a speedy, accessible and less formal system of enquiry for the worker whose employment has been terminated, and above all, may lead to an award for reinstatement.

However, the burden of proof is on the worker to show that his employment has been terminated because of one or more of such grounds laid down under section 64(1A) (above). Irrespective of any disciplinary hearing, of whether procedures have been followed, any reassessment of the charge or decision of the Respondent to terminate the contract of employment of Disputant, the Tribunal only has to decide whether the reinstatement (underlining is ours) of the worker is justified bearing in mind any charge levelled against the Disputant in the light of, what we would call, highly prohibitive grounds for termination of a contract of employment which are laid down at section 64(1A) of the Act, the state of the relationship between the parties and more particularly that it has not irretrievably been broken, the wish of the worker and any other relevant factors such as those laid down under section 97 of the Act such as principles of natural justice and principles and best practices of good employment relations. Any decision of the Tribunal should not however have a bearing on whether the termination of the agreement was justified or not. This is why the legislator has provided that where the Tribunal does not give an award for the reinstatement of a worker, the worker may still institute proceedings before the Court for unjustified termination of employment.

In the present case, ex facie the charges as levelled against Disputant at Annex O to the Statement of Case of Disputant, Docs A to A2 and the evidence on record, there is nothing to show that the charges relate to Disputant becoming or being a member of a trade union, seeking or holding of trade union office or participating in trade union activities. The Tribunal will here seek guidance from section 31 (***Protection against discrimination and victimisation***) of the Act at its sub-section 3 where the term “involvement in trade union activities” has been defined. Indeed, the charges levelled against Disputant (as per Annex O) and Docs A to A2 do not relate to any of the activities mentioned under the definition at section 31(3) of the Act. Had this been the case, such as if charges had been levelled against Disputant following a *bona fide* expression of grievance on behalf of another worker to an employer, the Tribunal would certainly have intervened if all other applicable conditions were met, that is, that the relationship had not irretrievably been broken and that it was just and reasonable in the circumstances to order reinstatement.

Also, there is nothing on record which shows that the charges relate to Disputant exercising a right under his agreement, any collective agreement, an award, the Act or any other enactment or the Constitution. It is apposite to note that at page 15 of the proceedings of 12 October 2020 before the Tribunal, the Disputant when asked in chief why he was averring that the ‘charge’ was against his rights of expression under the procedural agreement or the Constitution or his rights as President of the union under the ILO Convention, he replied that it was because Respondent acted ‘illegally’, against the ICTA Act to obtain the impugned ‘posts’. This Tribunal, for obvious reasons, cannot enquire whether a breach or an offence under the ICTA Act has indeed been committed. The Disputant has not adduced any evidence to show that the charges levelled against him would relate, for example, to protection granted under section 31(1)(b)(ii) of the Act.

In the case of **M.Hanzaree v. Maritim (Mauritius) Ltd 2015 IND 44**, the Industrial Court stated the following:

It is further to be reminded any citizen of this country is free to express his opinion so long as it does not affect the rights and freedoms and reputation of others; and such right is protected by law (see articles 12, 14 and 18 of the Code civil) and more importantly entrenched provisions in the Constitution, particularly Sections 3 and 12 ... [underlining is ours]

The Industrial Court in **M.Hanzaree (above)** however also referred to **Jurisclasseur, Droit du travail, Licenciement pour motif personnel, Fasc. 30-42 note 122**:

*122. Un abus de la liberté d’expression peut constituer une faute justifiant un licenciement. Si le salarié jouit, dans l’entreprise et en dehors d’elle, de sa liberté d’expression à laquelle il ne peut être apporté que des restrictions justifiées par la nature de la tâche à accomplir et proportionnées au but recherché, il ne peut abuser de cette liberté par des **propos injurieux, diffamatoires ou excessifs**.*

Any further examination of the particulars of the charge (as per Docs A to A2), at this stage, may impede upon the jurisdiction of the Industrial Court and may hinder the Disputant in the manner he may wish to proceed further concerning the present matter. Suffice it to say that had there been a clear indication that the ground for termination was in contravention of section 64(1A)(d) or (f), the Tribunal would have proceeded to the next stage of the exercise which is to assess the reasonableness or otherwise of giving an award for the reinstatement of the Disputant. This is not the case in the present matter.

As a side note, the terms of reference use words like “summarily dismissed” which connote the idea that there was a dismissal for gross misconduct (“*licenciement pour faute grave*”). The law now simply refers to termination of employment or of an agreement. Reinstatement of a worker shall be awarded by the Tribunal where the Tribunal finds that the claim for reinstatement of a worker in relation to termination of his employment on any of the grounds specified in section 64(1A) of the Act is justified and

where the Tribunal has reason to believe that the relationship between the parties has not irretrievably been broken.

For all the reasons given above, the Tribunal finds that the Disputant has not shown on a balance of probabilities that he should be reinstated and the dispute is thus set aside.

S.D Indiren Sivaramen

Acting President

S.D Francis Supparayen

Member

S.D Karen K. Veerapen

Member

S.D Arassen Kallee

Member

22 October 2020