EMPLOYMENT RELATIONS TRIBUNAL

RULING

Before: -

Shameer Janhangeer	**-**	**Vice-President**
Francis Supparayen	**-**	**Member**
Rabin Gungoo	**-**	**Member**
Kevin C. Lukeeram	**-**	**Member**

In the matters of: -

ERT/RN 9/2020

Mr Kajeerow COONLIC

Disputant

and

MAURITIUS TELECOM LTD

Respondent

ERT/RN 10/2020

Mr Marie Sylvestre Elie JULIE

Disputant

and

MAURITIUS TELECOM LTD

Respondent

ERT/RN 11/2020

Mr Jean Joseph DAVASGAIUM

Disputant

and

MAURITIUS TELECOM LTD

Respondent

ERT/RN 12/2020

Mr Georges Edouard CHRISTINE

Disputant

and

MAURITIUS TELECOM LTD

Respondent

ERT/RN 13/2020

Mr Samduth MOLAYE

Disputant

and

MAURITIUS TELECOM LTD

Respondent

ERT/RN 14/2020

Mr Mosafat Hajmut DOMUN

Disputant

and

MAURITIUS TELECOM LTD

Respondent

ERT/RN 15/2020

Mr Parama Seeven MOOROOGEN

Disputant

and

MAURITIUS TELECOM LTD

Respondent

The present matters have been referred to the Tribunal for arbitration by the Commission for Conciliation and Mediation ("CCM") pursuant to *section 69 (9)(b)* of the *Employment Relations Act* 2008, as amended (the "*Act*"). All seven disputes have been consolidated upon the joint motion of Counsel. The common Terms of Reference of the disputes read as follows:

> *Whether correction of anomaly in the grade of SS8A and SS8B, considered and accepted as at 1st July 2016, should have backdating effects for the employees who retired before July 2016, hypothetically or otherwise.*

Both parties were assisted by Counsel. Mr M. Ramano appeared for the Disputants, whereas Mr R. Pursem S.C. appeared for the Respondent employer.

The Respondent has put in a Notice of Objection in the present disputes. This provides as follows:

> *The Employment Relations Tribunal has no jurisdiction to entertain the present matter in as much as the Commission for Conciliation and Mediation erred in law in referring the matter to the Tribunal pursuant to section 69 (9)(b) of the Employment Relations Act 2008 given that the dispute was brought before the Commission prior to the coming into force of section 69 (9)(b) of the Employment Relations Act 2008.*

The matter proceeded on arguments relating to the objection raised. Mr R. Pursem S.C. for the Respondent notably submitted that the matter was reported to the CCM in January 2019 and at that time, *section 69* of the *Act* stood differently and to a large extent distinct from its present form. The Amendment Act was proclaimed on 27 August 2019. Referring to the previous *section 69 (7)*, Learned Senior Counsel submitted that the Commission had the obligation to refer the matter to the Tribunal within seven days provided that there was no agreement; and secondly, this can only be done with the consent of the worker. *Section 69* has now been purely and simply replaced by a new section. The Commission could not therefore have availed itself of the new *section 69 (9)* with respect to a dispute declared prior to August 2019.

It was Learned Senior Counsel's submission that the Commission could not have relied on *section 69 (9)* to make the present referral. It has no power to do so. As matters presently stand, the case has been wrongly referred to the Tribunal and therefore the latter cannot proceed. The

Tribunal does not therefore have jurisdiction under *section 69 (9)* to entertain the present dispute.

Mr M. Ramano, on behalf of the Disputants, notably submitted that the error, if error there is, has not been caused by the Disputants and they cannot be prejudiced for an error that is not of their doing. The matter could have been withdrawn, if it would not have been for the problem of time bar as the issue dates back to July 2016. Counsel therefore suggested that the matter be kept pending and the Tribunal liaise with the CCM to see if any adjustment can be made. However, Counsel could not refer to any specific provision in the law to enable the Tribunal to refer the matter back to the CCM.

The present disputes have been referred to the Tribunal by the CCM as per a letter, in each dispute, dated 11 March 2020. The salient aspect of the referral letter of the first disputant, which is similar to that of the other Disputants, reads as follows:

> *On 22 January 2019, **Mr Kajeerow Coonlic** reported to the President of the Commission for Conciliation and Mediation the existence of a labour dispute between himself and the **Mauritius Telecom Ltd** as per Section 64(1) of the Employment Relations Act 2008 (Act No.32 of 2008) as amended.*
>
> *Conciliation meetings were held at the Commission and no settlement has been possible.*
>
> *The Commission has, after due consideration and with the consent of the worker, referred the labour dispute to the Employment Relations Tribunal for arbitration, in terms of Section 69(9)(b) of the Employment Relations Act 2008 (as amended) as per enclosed terms of reference.*

A perusal of the above extract of the referral clearly shows that the matter was reported to the President of the CCM on 22 January 2019. It may also be noted that the second, third, fourth Disputants reported their disputes on 18 January 2018; whereas the fifth, sixth and seventh Disputants reported theirs on 25 January 2019. This is clearly prior to the proclamation of the *Employment Relations (Amendment) Act 2019* (*Act No. 21 of 2019*) (the "*Amendment Act 2019*") on 27 August 2019 (*vide Proclamation No. 34 of 2019*). As has been rightly observed by Leaned Senior Counsel for the Respondent, the *Amendment Act 2019* has repealed and replaced *section 69* of the principal *Act* with a new section (*vide section 21* of the *Amendment Act 2019*).

The referral letter has also revealed that the matter was referred pursuant to *section 69(9)(b)* of the *Act*, as amended. It has not been disputed that this particular provision was enacted pursuant to the *Amendment Act 2019* and came into force as from 27 August 2019.

In circumstances where a matter is already pending before the Commission prior to the coming into force of the 2019 amendments, the new transitional provisions, as introduced by *section 29* of the *Amendment Act 2019*, have notably provided as follows:

29. Section 108 of principal Act repealed and replaced

Section 108 of the principal Act is repealed and replaced by the following section –

> ***108. Savings and transitional provisions***
>
> *…*
>
> *(8) Any labour dispute which is reported to the President of the Commission before the commencement of the Employment Relations (Amendment) Act 2019 and which –*
>
> > *(a) has not been rejected by the President of the Commission or where it has been rejected, the rejection has been revoked on an appeal to the Tribunal under section 66; or*
> >
> > *(b) is referred to the Tribunal,*
>
> *shall be dealt with in accordance with Part VI as if sections 64, 65, 69, 70, 76, 78 and 88 have not been amended or repealed and replaced.*

The present disputes, having been reported to the CCM in January 2019, were clearly notified to the President of the CCM prior to 27 August 2019, which is the commencement date of the *Amendment Act 2019*. It was thus incumbent on the CCM to refer the matter in accordance with the relevant provisions of *section 69* of the principal *Act* as if same has not been amended or repealed and replaced. Therefore, the present disputes ought to have been referred pursuant to *section 69 (7)* of the *Act* as it stood prior to 2019 amendments.

Although, it is understood that the Tribunal is required to enquire into the substance of the dispute that is referred to it and to make an award thereon (*vide Air Mauritius Ltd v*

Employment Relations Tribunal [*2016 SCJ 103*]), the Tribunal cannot be precluded from resolving as to whether it has the requisite jurisdiction to inquire into a labour dispute. It would be apposite to note the following from a ruling of the then Permanent Arbitration Tribunal in *Mrs C. M. Tatiah and Development Bank of Mauritius (RN 758)* delivered on 4 August 2004:

> *The Tribunal wishes to address itself first on whether once a referral is made, it is bound to adjudicate on the dispute. Indeed Section 83 of the Industrial Relations Act 1973 as amended states "Where any dispute is referred to the Tribunal by the Minister under section 82, the Tribunal shall, with all diligence, inquire into the dispute and make an award on it". Section 5 of the* ***Interpretation and General Clauses Act*** *defines "shall" as "may be read as imperative". (the underlining is ours).*
>
> *Are we to hear any dispute referred to us by the Minister if the Tribunal finds that the dispute does not fall within the legal parameters of an industrial dispute as per the Industrial Relations Act 1973 as amended?*
>
> ***Russell on Arbitration****, 18th Edition by Anthony Walton Q.C. at page 73 reads:*
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> *"It can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. However, an arbitrator is always entitled to inquire whether or not he has jurisdiction.* ***(see Brown v. Oesterreichischer Waldbesitzer R.G.m.b.h. (1954) (Q.B.8)*** *An umpire faced with a dispute whether or not there was a contract from which alone his jurisdiction, if any, deal with the matter at all and leave the parties to go to the court, or he can consider the matter and if he forms the view that the contract upon which the claimant is relying and from which, if established, alone his jurisdiction can arise is in truth the contract, he can proceed accordingly.* ***(Per Roskill J. in Lunada Exportadora and others v. Tamari and Sons and Others (1967) L. Lloyd's Rep. 353 at page 364)****."*

The Tribunal, having the principal task of arbitrating labour disputes, is also alive to the doctrine of Competence-Competence (or *compétence de la compétence* as known in French), which is well established in arbitration laws, as reflected in *section 20 (1)* of the *International Arbitration Act* (*Act 37 of 2008*). This doctrine allows an arbitral tribunal to rule on its own jurisdiction. In the English Court of Appeal case of *Fiona Trust & Holding Corporation and Ors. v Privalov and Ors.* [*2007*] *EWCA Civ 20*, it was notably held *per curiam* that '*the arbitrators should, in general, be the first tribunal to consider whether there is a valid arbitration agreement and whether the arbitrators have jurisdiction to determine the dispute*'.

It would also be pertinent to note the following from *Redfern and Hunter on International Arbitration*, *6th edition*, by *N. Blackaby and C. Partasides QC*, *p.339 – 340*, on the power of an arbitral tribunal to rule on its jurisdiction:

> *It is generally accepted that an arbitral tribunal has the power to investigate its own jurisdiction. This is a power inherent in the appointment of an arbitral tribunal. Indeed, it is an essential power if the arbitral tribunal is to carry out its task properly. […] The arbitral tribunal's decision on the issue may be reviewed subsequently by a competent national court – but it is commonly accepted that this does not prevent the tribunal from making the decision in the first place.*

The Tribunal has noted the stance of Counsel for the Disputants in submitting that the Disputants are being prejudiced through no fault of their own. He even proposed that the Tribunal liaise with the Commission regarding any adjustments that may have to be made. However, he could not point to any provision which would allow the Tribunal to revert a dispute to the CCM following its referral for arbitration.

Although, *paragraph 6* of the *Second Schedule* of the *Act* provides that the Tribunal '*shall exercise its jurisdiction in any proceedings in such manner as to enable the parties to the proceedings to avail themselves of the conciliation and mediation services*' of the CCM, the issue is not whether the process of conciliation and mediation has been applied to the present disputes The referral letters clearly show that conciliation meetings were held at the level of the Commission and that no settlement was reached prior to the matters being referred to the Tribunal.

The Tribunal can only sympathise with the plight of the Disputants, but notes that it is bound to rule on any objection raised in a dispute. Given that the objection taken by the Respondent goes to the root of the Tribunal's jurisdiction to inquire into the present consolidated disputes, the Tribunal cannot proceed to arbitrate on them based on the referrals wrongly made in law by the CCM.

The dispute in each case is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

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SD Francis Supparayen
(Member)

...
SD Rabin Gungoo
(Member)

...
SD Kevin C. Lukeeram
(Member)

Date: 11th August 2020