**EMPLOYMENT RELATIONS TRIBUNAL**

**AWARD**

**ERT/ RN 30/19, ERT/RN 31/19**

**Before**

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| **Indiren Sivaramen** | **Vice-President** |
| **Marie Désirée Lily Lactive** | **Member** |
| **Abdool Feroze Acharauz** | **Member** |
| **Kevin C. Lukeeram** | **Member** |

**In the matter of:-**

**Mr Christ Darbary (Disputant No. 1)**

**And**

**Air Mauritius Ltd (in Administration represented by Mr S A Abdoula and Mr Gokhool) (Respondent)**

**I.P.O: Air Mauritius Technical Services Staff Union (Co-Respondent)**

**Mr Rajesh Hasseea (Disputant No. 2)**

**And**

**Air Mauritius Ltd (in Administration represented by Mr S A Abdoula and Mr Gokhool) (Respondent)**

**I.P.O: Air Mauritius Technical Services Staff Union (Co-Respondent)**

The above two cases were referred to the Tribunal by the Commission for Conciliation and Mediation against Air Mauritius Ltd as the Respondent under the then Section 69(7)

(repealed since then by section 21 of the Employment Relations (Amendment) Act 2019) of the Employment Relations Act (hereinafter referred to as "the Act"). The 'Savings and transitional provisions' brought by the Employment Relations (Amendment) Act 2019 provide (at section 108(8) of the Act as amended) that "*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) ….. ; 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shall be dealt with in accordance with Part VI as if sections 64, 65, 69, 70, 76, 78 and 88 have not been amended or repealed and replaced*." As per the referrals, the present disputes were reported to the President of the Commission for Conciliation and Mediation on 11 December 2017, that is, before the commencement of the Employment Relations (Amendment) Act 2019. The Tribunal thus proceeded to hear the cases on the basis that the then section 69 of the Act had not been repealed and replaced.

The two cases were consolidated following a motion made by Counsel for Disputants and to which there was no objection. The Co-Respondent was then joined as a party in the above cases. Whilst the cases were pending before the Tribunal, Air Mauritius Ltd was placed under voluntary administration with administrators appointed for the company. Necessary approvals were sought on behalf of Disputants and were obtained for the Tribunal to proceed with the present cases. The parties were assisted by Counsel except for the Co-Respondent which was represented by an officer of the union. The terms of reference are similar in both cases and read as follows:

*"Whether I should have benefited 2 increments in year 2014 and 4 further increments in year 2015 to sort out the relativity issue of my salary with that of other colleagues in the same grade and henceforth my salary re-adjusted accordingly."*

The Disputants are claiming that they should benefit from six increments as Certified Workshop Technicians in the light of an adjustment equivalent to six incremental points paid to employees who were already Certified Workshop Technicians under an Agreement dated 18 July 2014 which was signed between Air Mauritius Ltd and Co-Respondent.

Arguments were heard in relation to a preliminary point raised on behalf of Air Mauritius Ltd and a ruling was delivered. However, following a change in the panel of members hearing the case, the Tribunal agreed with the request of the Respondent for the cases to be started anew. The preliminary point taken on behalf of Air Mauritius Ltd as well as a new second limb to the preliminary point were raised before the present panel, and the Tribunal proceeded to hear the preliminary point under both limbs together with the merits of the matter. The Tribunal thus proposes to deal with the preliminary point (under both limbs) first before considering the cases on their merits, if and as required.

Counsel for Respondent has raised a preliminary point in law to the effect that both disputes are time barred inasmuch as both Disputants were appointed as per their contracts of employment on 21 October 2014 as Certified Workshop Technicians whilst the dispute was reported to (the President of) the Commission for Conciliation and Mediation on 11 December 2017 in both cases. Counsel suggested that both disputes are time barred as per the Act since they have been reported more than three years after the act/s or omission/s that gave rise to the said disputes. Counsel for Disputants resisted the point raised and argued that there is no time bar since they were confirmed in their posts only in April 2015. In the alternative, he suggested that if the date of omission was on the date of promotion, then only two months would be outside delay and that since there was a 'continuous' omission every month that Air Mauritius Ltd did not pay the first set of two increments, the Disputants would still be able to proceed with their claims for the remaining months up to now and that there will be no time bar.

By virtue of section 108(9) (Savings and transitional provisions) of the Act as amended, any labour dispute pending immediately before the commencement of the Employment Relations (Amendment) Act 2019 before the Tribunal shall be dealt with in accordance with Part VI of the Act as if the definition of "labour dispute" in section 2 and sections 64, 65, 69, 70, 76, 78 and 88 have not been amended or repealed and replaced. Thus, the relevant definition of "labour dispute" for the purposes of the present matter is the definition as worded prior to the amendment brought by the Employment Relations (Amendment) Act 2019. In any event, the relevant part of the definition for the purposes of the preliminary point taken has not changed with the amendment.

"Labour dispute" was thus defined in section 2 of the Act as follows:

*"labour dispute" –*

*(a) means a dispute between a worker, or a recognised trade union of workers, or a joint negotiating panel, and an employer which relates wholly or mainly to wages, terms and conditions of employment, promotion, allocation of work between workers and groups of workers, reinstatement or suspension of employment of a worker;*

*(b) does not, notwithstanding any other enactment, include a dispute by a worker made as a result of the exercise by him of an option to be governed by the recommendations made in a report of the Pay Research Bureau or a salary commission, by whatever name called, in relation to remuneration or allowances of any kind;*

*(c) does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute*

Part (c) above of the definition is the relevant part. The Tribunal first has to ascertain what is the act/s or omission/s which gave rise to the disputes (**vide D. Ramyead-**

**Banymandhub v The Employment Relations Tribunal 2018 SCJ 252**). The Tribunal has had the opportunity in the present matter to hear the whole of the evidence adduced before it. Though Counsel for Respondent relied on this preliminary point, he did not identify the act or omission which gave rise to the disputes in the present case, except that he proceeded on the basis that the date of appointment of the Disputants as Certified Workshop Technicians would be the starting point for the delay of three years to run. He also intimated that the claim for the two increments payable in year 2014 would definitely be time-barred.

The Tribunal has examined all the evidence adduced and the arguments of both Counsel on this issue. The basis of the claims made by the Disputants cannot be the Agreement signed between Air Mauritius Ltd and Co-Respondent on 18 July 2014 since the only reasonable and plausible interpretation of that Agreement, in the line of the clear language used in the Agreement and the references made to the beneficiaries who would be AMTSSU members as per the list annexed to the said Agreement or from the submitted list, is that it did not provide for the Disputants. The Disputants are thus relying on a "relativity issue" of their salary with those of other colleagues in the same grade as them (as is apparent from the terms of reference).

The evidence adduced on behalf of the Disputants is to the effect that they started negotiations as from April 2015. This has not been seriously challenged. The onus lies on the Respondent to show with precision the act or omission that gave rise to the dispute and the date on which this act or omission occurred. The Tribunal may here refer to the case of **Vacoas Popular Multipurpose Cooperative Society Ltd v Monohur H. 2018 SCJ 300,** where the Supreme Court was of the view that the onus lied on Mr Monohur to show with precision "*le jour où le droit d'action a pris naissance*" pursuant to **Article 2271 of the Civil Code of Mauritius**. The Learned Judge in the abovementioned case also relied on the following extract of **Gujadhur v. Gujadhur, Privy Council Appeal No. 51 of 2006:**

*"… In the ordinary case of an action under a contract, the cause of action does not accrue when the contract is made but when one of the parties fails to perform it…."*

The Supreme Court went on to state the following:

*The case of Gujadhur (supra) itself concerned the enforcement of contractual obligations constituted by a "contre lettre". The Privy Council held that – "What matters is that it was contractual and that for the purposes of article 2271 of the Code, a cause of action arose when the appellants refused to perform the contract and not before."*

In the judgment of the Privy Council in the case of **Gujadhur v. Gujadhur (above)**, their Lordships stated the following:

*Article 2271 of the Mauritian Civil Code, which was adopted from the Code of Quebec by Act No 9 of 1983, provides that "le délai de prescription court à compter du jour où le droit d'action a pris naissance." The question therefore is when the cause of action arose.*

The Tribunal will refer, as guidance, to a decision of the Supreme Court of Canada in the case of **Méthot c. Commission de Transport de Montréal, [1972] R.C.S. 387,** where the Court was of the view that :

*Un droit d'action ne prend naissance qu'au moment où un demandeur a un droit immédiat d'intenter et de poursuivre son action.*

In the present case, though the Disputants were promoted Certified Workshop Technicians with effect from 21 October 2014 (Annexes E to the Statements of Case of the Disputants), there is no evidence that they were aware then and there of the Agreement between Air Mauritius Ltd and Co-Respondent (Annex I to the Statements of Case of the Disputants) or that they were aware of the alleged discrepancies which they are challenging now. As per Annexes E to the Statements of Case of the Disputants, they were formally informed by way of a document dated 19 November 2014 (in each case) of their promotion as Certified Workshop Technician effective from 21 October 2014 and in the case of Disputant No 1 at least, the agreement to the appointment was signed by the latter only on 4 February 2015. No evidence has been adduced to show that they could have reported a dispute on 21 October 2014 itself or that they should have known that they could report such a dispute. Instead, evidence has been adduced of discussions which would have occurred for some two years before a deadlock would have been declared in 2017 (as per Doc C). In the absence of conclusive evidence (even after having heard the case on the merits) that the Disputants knew or should have known of the matters of which they are complaining of since 21 October 2014, the Tribunal finds that the Respondent has failed to show on a balance of probabilities that the act or omission that gave rise to the present disputes in fact occurred on 21 October 2014, the effective date as from which they were both appointed Certified Workshop Technicians.

The Tribunal thus finds that the Respondent has not shown on a balance of probabilities that the disputes were time barred under section 2 of the Act (definition of 'labour dispute') and thus outside the jurisdiction of the Tribunal. For the reasons given above, the first preliminary point is set aside.

The Respondent has taken a second preliminary point to the effect that the Disputants who are members of the Co-Respondent have failed to follow the procedures laid down in the Procedure Agreement signed between Respondent and Co-Respondent. Reference has been made particularly to Article 12 of the said Procedure Agreement and emphasis was also laid on sections 64(2)(a)(ii) and (iii), 65(1)(d) and 67(2) of the Act. The Tribunal has examined carefully the provisions of the law relied upon by Counsel for Respondent. First of all, Counsel for Respondent cannot rely on provisions of the law, and more particularly sections 64(2)(a)(ii) and (iii), and 67(2) of the Act which were not yet in force when the cases were referred to the Tribunal (vide also section 108(9) of the Act mentioned above). For the sake of completeness and since it concerns the jurisdiction of the Tribunal, the Tribunal nevertheless proposes to consider the point taken in the light of corresponding provisions which already existed under the

Act (the old sections 64(2) and 67(c)) prior to the Employment Relations (Amendment) Act 2019.

Under none of those provisions (including section 65(1)(d)) is there mention that the Tribunal cannot hear or entertain such disputes or that the Tribunal does not have jurisdiction to hear such disputes. Under the provisions of the law relied upon by the Respondent (or their corresponding provisions), there is mention that no dispute shall be reported, that the President of the Commission for Conciliation and Mediation may reject a report of a labour dispute where the latter is of opinion that the party reporting the dispute has failed to comply with the dispute procedures specified in this Act or provided for in a procedure agreement, or still that no party may report a labour dispute on matters listed under the now repealed section 67(c) of the Act (now section 67(2) of the Act). We are no longer at the stage of a dispute being reported to the Commission, and the Tribunal is not empowered to rule or decide on whether the Commission has properly accepted a report of a dispute. The only jurisdiction given to the Tribunal on appeal (under section 66 of the Act) relates to a party who is aggrieved by a rejection of a dispute by the President of the Commission and the Tribunal may confirm or revoke the decision of the President of the Commission. There is no special power given to the Tribunal to confirm or revoke the decision of the President of the Commission to accept a report of a dispute.

Under section 70(1) of the Act (prior to the 2019 amendment), the Tribunal shall enquire into a labour dispute referred to it under section 69(7) of the Act. Thus, the Tribunal shall enquire into the dispute provided it is indeed a labour dispute as defined under the Act, and the dispute is not otherwise excluded from the jurisdiction of the Tribunal under section 71 of the Act (underlining is ours).

For all the reasons given above, the plea in limine taken under this limb of the objections is also set aside.

The Tribunal will thus proceed with the merits of the case. The Tribunal has examined carefully all the evidence adduced including evidence adduced in relation to various applications made by the Disputants for the issue of the Workshop Authorisation Document to be eventually promoted to the grade of Certified Workshop Technician. The Quality Assurance Office of the Respondent recommended on 12 September 2014 and 11 September 2014 (Annexes 4 and 5 to the Statement of Reply of Respondent to the case of Disputant No 1 and Annexes 5 and 6 to the Statement of Reply of Respondent to the case of Disputant No 2) for the issue of the relevant Authorisation to Disputants No 1 and 2 respectively, subject to approval from the European Union Aviation Safety Agency (EASA). The Disputants obtained the approval from EASA on 24 October 2014. In the light of the terms of reference of the disputes before us, the approval which was necessary from EASA for the granting of the Authorisations, and

the said Authorisations which were needed for appointment as Certified Workshop Technicians, the present disputes cannot be used directly or indirectly to challenge in any manner the Authorisations or dates of appointment of Disputants as Certified Workshop Technicians. This would, in any event, be *ultra petita* the terms of reference. Counsel for Disputants was fully alive to this and referred more generally to the 'background' when referring to this aspect of the case. The Tribunal will and can only accept the dates on which it is unchallenged that the Disputants obtained their Authorisations and were eventually promoted Certified Workshop Technicians.

The Disputants referred to the Agreement signed between Air Mauritius Ltd and Co-Respondent (Annex I to the Statements of Case of Disputants) to claim that they should also benefit from the adjustment of "six incremental points" granted to AMTSSU members as per the list annexed to the said agreement. The said Agreement is very clear and is limited specifically to the officers listed down in the said Annex. The parties to the Agreement even go further and provide at paragraph 4 of the said Agreement the following:

"*AMTSSU shall make no further claim whatsoever with respect to their claim of loss of relativity following the implementation of the MoU signed between Management and AMSA in December 2011*."

The Annex to the Agreement, mentioned above, does not include the name of any of the two Disputants who were not even issued with the relevant Authorisations and who were not yet promoted as Certified Workshop Technicians at the time of the signing of the Agreement. The purpose of the Agreement was "to re-establish relativity following the payment of increments to AMSA members in 2012, 2013 and 2014 under Memorandum of Understanding (MoU) signed in 2011". There is unrebutted evidence that the Disputants were members of AMSA as Technicians and did benefit from salary increases and increments paid to AMSA members as from 2011 as per the Letter of Understanding (a summary of conditions agreed to be incorporated in the MoU) signed between AMSA and Air Mauritius Ltd (Annex H to the Statements of Case of the Disputants).

The clear intention of the parties to the Agreement signed between Air Mauritius Ltd and Co-Respondent (Annex I to the Statements of Case of the Disputants) was to restrict the adjustment of six incremental points only to the officers mentioned in the Agreement signed on 18 July 2014. No other interpretation is at all possible and the Tribunal views with great concern the evidence elicited from the representative of Co-Respondent before the Tribunal under solemn affirmation.

The re-establishment of the "relativity" mentioned in the Agreement signed on 18 July 2014 (Annex I to the Statements of Case of the Disputants) relates to salary increases and increments paid to AMSA members under the Letter of Understanding signed between AMSA and Air Mauritius Ltd (Annex H to the Statements of Case of the Disputants). It has nothing to do with "relativity" with the salaries of other colleagues in the same grade when the Disputants were not even Certified Workshop Technicians in July 2014, and were thus not in the same grade as other officers who were already Certified Workshop Technicians on 18 July 2014. There were initially issues concerning the basic salary starting point and ratings but these have been already thrashed out before a different forum as per the evidence led by the Disputants. The Disputants are on the relevant TS 3 salary band and there is no averment before us that they are not in the salary band or salary scale, if any, applicable for Certified Workshop Technicians. The Tribunal has no hesitation at all in finding that in the light of the express provisions of the Agreement of 18 July 2014 and the list of names as per the Annex to the Agreement, the Disputants are not covered by the said Agreement. In the case of Disputants, there was no need to re-establish relativity following the payment of increments to AMSA members the more so that they were then AMSA members, and benefitted from such payments. The only possible claim for adjustments, if any, would in fact be as suggested by the terms of reference, that is, a relativity issue of their salary with that of other colleagues in the same grade as them, that is, Certified Workshop Technicians. However, this is based on a completely wrong premise. Indeed, a relativity issue would arise, for example, if the Disputants were <u>already</u> benefitting from a particular salary as Certified Workshop Technician and the salaries of other Certified Workshop Technicians were increased with no increase being granted to the two Disputants (underlining is ours). This is clearly not the case here. The Disputants were not in the same grade of workers as other Certified Workshop Technicians and were not Certified Workshop Technicians at the time the Agreement was entered into on 18 July 2014 between Air Mauritius Ltd and Co-Respondent. The Tribunal notes that it is not only in this Agreement that the parties deliberately agreed to limit the agreement (on the basis of re-establishing relativity as at the date of the said Agreement) to members who were already in particular grades. Even the Memorandum of Understanding between Air Mauritius Ltd and AMSA (Annex G to the Statements of Case of the Disputants) at paragraph 3 (at its page 3) provided, for example, the following:

*A conversion formula to move from existing AM/LS salary scale to TS3 salary band is enclosed in Annex 1 for <u>existing staff who are Certifying Technicians, MCC and LAEs</u>.* (underlining is ours).

The Memorandum of Understanding between Air Mauritius Ltd and AMSA (Annex G to the Statements of Case of the Disputants) in fact provides interesting information as to the intention of the parties when entering into the said Memorandum. Indeed, first of all,

even though Workshop Technicians (as the Disputants then were) formed part (and apparently still form part) of the bargaining unit of AMSA, paragraph 4 of the Memorandum of Understanding (which contains, inter alia, terms and conditions of employment) provides that the "*terms and conditions of this MOU effective 1 April 2010 shall be deemed to be binding exclusively on the category of employees listed above*." The category of workers would be those exiting from AMSA and mentioned at paragraph 3 and which included Certifying Staff and Certifying Technician (and not Workshop Technicians).

The Memorandum of Understanding between Air Mauritius Ltd and AMSA further provides as follows:

*New LAE and CWT*

*Introduction of new LAE or CWT and any additional authorizations will be subject to company's requirements.*

Also, AMSA agreed as a condition precedent to the implementation of the Memorandum of Understanding (at paragraph 5 of the Memorandum) that "*The Technical Services Professional Salary Band TS3 shall not be governed by any agreement signed between The Company and The Air Mauritius Staff Association*."

The migration of existing Certified Workshop Technicians from the LS5 salary scale to the TS3 salary band was carried out through a fairly complex and out of the ordinary manner. Indeed, Certified Workshop Technicians had to 'exit' from their former trade union, AMSA. The MoU between Air Mauritius Ltd and AMSA even refers to an Acceptance Form which had to be signed individually by all employees concerned. The Acceptance Form which is annexed as Annex 3 (included in Annex G to the Statements of Case of the Disputants) to the MoU is very telling as to the undertakings which relevant officers had to give at the time of the migration. Though we bear in mind that the Form included as Annex 3 to the MoU refers to Licensed Aircraft Engineer, the latter had to expressly undertake to obtain three type ratings within 24 months from 1 April 2010 failing which the latter agreed that he shall be reverted back to the terms and conditions of employment under which he was employed prior to the signing of the form. In the present matter, the issue of workshop ratings has been thrashed out before another forum and does not form part of the terms of reference of the disputes before us. The Tribunal is thus left in the dark as to the pertinence of workshop ratings for Certified Workshop Technicians and their relevance, if any, to starting salary point, for example. This is something which has already been thrashed out.

The Tribunal cannot be requested to arbitrate on a "relativity issue" whilst important and relevant issues have been laid to rest, are not within the knowledge of the Tribunal and are matters over which the Tribunal has no control. It is unchallenged that Disputants

are in the same salary band (TS3) as other Certified Workshop Technicians and from the MoU entered between Air Mauritius Ltd and AMSA, it appears that there is no flat salary for Certified Workshop Technicians. The present situation results from negotiations and Agreements/MoUs reached between relevant trade unions (both AMSA and Co-Respondent) and management. The Tribunal certainly cannot discard the possibility that there are indeed objective justifications for the granting of six incremental points to the then existing Certified Workshop Technicians who were no longer represented by their trade union and in the same vein lost the benefit of certain rights obtained under relevant agreements signed by the said union. The Disputants meanwhile were benefitting from salary increases and increments assisted by their trade union.

The Tribunal finds that in the light of all the evidence on record, the Disputants have failed to satisfy the Tribunal on a balance of probabilities that there is a relativity issue between their salaries and those of their colleagues in the same grade and who are in the same salary band as them and who were Certified Workshop Technicians before them. Similarly, on the basis of the evidence before us, they have not convinced us that there is any infringement in relation to the principle of equal pay for work of equal value.

As a concluding note and even though the Tribunal has no jurisdiction to revoke the decision of the President of the Commission for Conciliation and Mediation to accept a report of a dispute, the Tribunal wishes to draw the attention of parties and the referring body to sections 64(2), 65(1) and 67(2) of the Act. The intention of the legislator is clear and where, for example, procedures provided in a relevant procedure agreement have not been followed, no dispute shall be reported to the Commission. The President of the Commission for Conciliation and Mediation may reject the report of the labour dispute under section 65(1) of the Act. The legislator in his wisdom has provided for such provisions and these contribute to foster collective bargaining within organisations and promote good and harmonious employment relations. In our mind, the present matter is a good example of what the legislator intended to avoid. Indeed, the best and most efficient way to deal with anomalies, if any, following complex agreements reached between recognised trade unions and management after presumably long negotiations would still be by way of negotiations and agreements reached between the unions and management. By allowing individual workers to proceed as they did whilst not complying strictly with Article 12 of the procedure agreement as was conceded by Counsel for Disputants himself, there is a real risk of undermining collective bargaining within an enterprise. This is besides the risk of creating further anomalies instead of curing anomalies the more so when issues within one dispute are dealt with in a piecemeal manner before different institutions.

For all the reasons given above, the Disputants have failed to show that they should have benefited from the six incremental points sought and the disputes are purely and simply set aside.

**SD Indiren Sivaramen**

**Vice-President**

**SD Marie Désirée Lily Lactive**

**Member**

**SD Abdool Feroze Acharauz**

**Member**

**SD Kevin C. Lukeeram**

**Member**

**23 July 2021**