

EMPLOYMENT RELATIONS TRIBUNAL

ORDER

ERT/RN 185/2020

Before: -

Shameer Janhangeer	Vice-President
Vijay Kumar Mohit	Member
Karen K. Veerapen (Mrs)	Member
Arassen Kallee	Member

In the matter of: -

Mr Denis Gerard Ashley JOLA

Appellant

and

The President of the Commission for Conciliation and Mediation

Respondent

The present matter is an appeal against the decision of the President of the Commission for Conciliation and Mediation (the “CCM”) rejecting the report of a labour dispute pursuant to *section 66 of Employment Relations Act* (the “Act”), as amended. The Appellant (then Disputant) reported a dispute to the CCM against Air Mauritius (Administrators Appointed) Ltd as follows: ‘*After having accepted a salary decrease of more than 50%, my employer want to send me on LWP*’.

The Appellant has now, by way of an email dated 12 December 2020, appealed to the Tribunal against the decision of the President of the Commission of 7 December 2020, whereby he was informed that the dispute reported was being rejected under *section 64 (2)(a)(ii) & (iii), section 65 (1)(d) and section 67 (2) of the Act*. The President of the CCM is resisting the appeal.

Both parties were assisted by Counsel. Mr G. Bhanji-Soni, together with Mr T. Jugoo, appeared for the Appellant; whereas Miss B.H. Maherally, Ag. Senior State Counsel instructed by Miss S. Angad, Principal State Attorney appeared for the Respondent.

THE APPELLANT'S STATEMENT OF CASE

The Appellant, in his Statement of Case, has extensively set out the background regarding events with the Respondent leading to his labour dispute. In relation to the present appeal, he has notably averred that the Respondent was wrong to have reached the conclusion that there were no meaningful negotiations between the parties and that no deadlock was reached; and that he did not follow the dispute procedures provided in the *Act* or in a dispute resolution agreement. The Appellant had raised the issue of leave without pay, non-payment of gratuity and conflicting provisions of his contract with the Collective Agreement 2020 in accordance with the Procedure Agreement executed with the employer with superiors and the Executive Vice president (HR) Mr Jolicoeur by email. He was directed to the Administrators, who turned a deaf ear to the numerous emails sent to them. The assistance of the Ministry of Labour was sought and meeting was convened on 22 October 2020. A deadlock was reached after two meetings. His union, the MALPA, also attempted to negotiate with the Joint Administrators but received a negative reply.

The Appellant has also averred that the Respondent was wrong to have come to the conclusion that the Appellant had reported a dispute on the terms of the Collective Agreement 2020. His dispute is mainly in relation to terms and conditions of his employment contract which are in breach of the aforesaid Agreement. He is not seeking to challenge the terms of the Collective Agreement. The issue of leave without pay was not raised or canvassed at the negotiations between MALPA and the Joint Administrators. The decision of the Joint Administrators to send him of leave without pay is in breach of the Collective Agreement 2020 and of the *Workers' Rights Act 2019*.

THE RESPONDENT'S STATEMENT OF DEFENCE

The Respondent, on the other hand, has in its Statement of Defence notably averred that the Appellant has raised new elements in his Statement of Case which did not form part of the report of labour dispute reported to the Respondent on 2 December 2020. The Appellant failed to produce/adduce evidence before the CCM to substantiate that meaningful negotiations had taken place and a deadlock had been reached. Procedures as laid under *section 64 (2)(a)* of the Act had not been complied with. The Collective Agreement signed on 16 July 2020 is still in force and binding. The Respondent rejected the labour dispute by letter dated 7 December 2020 under the sections of the law stated therein.

THE EVIDENCE OF WITNESSES

The Appellant, Mr Denis Gerard Ashley Jola, adduced evidence in relation to the present appeal. He swore as to the correctness of his Statement of Case. He also produced an email dated 19 November 2020 (Document A) through which he had reported a dispute to the CCM as well as the Labour Dispute Form attached (Document A₁). He also produced the Collective Agreement of 2011 (Document B); the Collective Agreement of 2018 (Document C); and the Collective Agreement of 2020 (Document D).

When questioned by Counsel for the Respondent, Mr Jola notably stated that his report of dispute was made on 19 November 2020 to the CCM. His labour dispute is stated at paragraph 4 of the Dispute Form and is about leave without pay. He agreed that the issue of leave without pay does not form part of the Collective Agreement. He also confirmed that the issue of leave without pay was not even raised for the purpose of the Collective Agreement. There is no mention of discussions with the employer in the Dispute Form. The word '*deadlock*' is not mentioned in the Dispute Form; it was only mentioned that there were two meetings at the Ministry of Labour. The aforesaid word was mentioned in the email sent to the CCM.

Mr Vinesh Bisumber, Labour and Industrial Relations Officer, was called on behalf of the Respondent. He swore as to the accuracy and correctness of the Respondent's Statement of Defence. Upon questions from Counsel for the Appellant, he notably stated that the CCM received the Appellant's email on 1 December 2020 and not on 19 November 2020. The email dated 19 November 2020 was attached to the one dated 1 December 2020. The email dated 19 November 2020 is not in their records. There were no meetings held with the Appellant after the

dispute was reported. This was decided by the President of the CCM, who took the decision to reject the dispute by letter dated 7 December 2020 (produced as Document E).

Mr Bisumber, regarding the sections mentioned in the letter dated 7 December 2020, stated that it is the sole responsibility of the President to reject a case. He produced an email dated 1 December 2020 from Mr Jola (Document F). When put to him that there is no proper reason mentioned in the letter dated 7 December 2020 for rejecting the dispute, he stated that the decision solely rests with the President, who acted as per the law. When re-examined by Counsel for the Respondent, he notably stated that from the email produced as Document F, the email address of the CCM is not mentioned. He also stated that no meetings are held before rejecting a dispute.

THE SUBMISSIONS OF COUNSEL

Learned Counsel for the Appellant notably submitted that the manner in which the dispute has been rejected falls foul of the duty to give reasons as to why a decision is being made in referring to the letter dated 7 December 2020 from the Respondent. A number of documents were annexed with the Labour Dispute Form and one of them mentioned meetings at the Labour Office, where there was a deadlock. The dispute was rejected outright without the Appellant being called before the CCM. Reference was made to the annexure to the Labour Dispute Form in relation to the issue of meaningful negotiations and deadlock.

Learned State Counsel for the Respondent notably submitted that there is no legal obligation to have any meeting before the rejection of a dispute. The words '*meaningful negotiations*' in *section 64 (2)* of the Act are now defined following the 2019 amendments. This is not present as per the Labour Dispute Form. The CCM cannot look for information to supplement what is missing. Reference was made to the decision of the Tribunal in *Hotels and Restaurants Employees Union and The President of the CCM (ERT/RN 133/17)*. In *Port Louis Maritime Employees Association and The President of the CCM (ERT/RN 151/2018)*, there was no evidence before the CCM that there was a deadlock and the decision to reject was upheld.

State Counsel also referred to *section 69 (1) & (2)* of the Act in relation to *section 64 (2)*. Rejection comes outright. Meetings are only held when there is no rejection. There is no legal obligation for meetings to be held. It was also stated if dispute procedures under the Act are not followed, this is a ground for rejection. The word 'deadlock' is not mentioned in the Labour Dispute Form. Moreover, the issue of leave without pay was not raised with the Administrators and was not canvassed during the negotiating process for a collective agreement. This is one of the three ground set out in *section 67 (2)(c)* of the Act. *Ex-facie* the report itself, the grounds for rejection are fully justified. There was no need to call a meeting or give any reason. The reasons are contained in the sections of the law.

THE MERITS OF THE APPEAL

In the present matter, the Disputant reported a dispute on 2 December 2020 to the CCM worded as 'After having accepted a salary decrease of more than 50%, my employer want to send me on LWP'. This report of dispute was made against his employer Air Mauritius (Administrators Appointed) Ltd by email with a Labour Dispute Form (Document A₁) attached thereto. Thereafter, on 7 December 2020, the President of the CCM informed the Appellant that his dispute was being rejected.

It would be useful to reproduce the salient aspects of the letter of the President of the CCM, which serves as notice under *section 65 (3)* of the Act and is the basis of the present appeal to the Tribunal:

Please refer to the labour dispute reported by you to the President of the Commission for Conciliation and Mediation against Air Mauritius Ltd (Administrators Appointed) on 2 December 2020.

2. *I regret to inform you that the labour dispute is being rejected under Section 64(2)(a)(ii) & (iii), Section 65(1)(d) and Section 67(2) of the Employment Relations Act 2008 (ERA 2008) as amended, which reads as follows:*

...

The letter thereafter quotes verbatim the relevant sections of the law cited thereat. Nothing more is stated in relation to the decision to reject the report of the labour dispute.

The Appellant submitted a Statement of Case before the Tribunal whereby he has notably averred that the conclusions and decision of the Respondent is wrong and gives his reasons why. Having noted that the Appellant swore as to the correctness of his Statement of Case in support of his appeal, it would proper to consider the material averments of the following paragraphs:

Reporting of dispute at the level of the Commission of the Conciliation and Mediation

...

34. *Appellant avers that the conclusion and decision of the Respondent is wrong for the following reasons: -*

Negotiations and deadlock

- (a) *The Respondent is wrong to have reached the conclusion that there were no meaningful negotiations between the parties and there was no deadlock reached in light of the averments made at paragraphs 30, 31 and 32 above.*

Dispute resolution procedure

- (b) *The Respondent is also wrong to have reached the conclusion that the Appellant did not follow the dispute resolution procedure in the Act or provided for in a dispute resolution agreement inasmuch in light of the averments at paragraphs 30, 31 and 32 above.*

Collective Agreement

- (c) *The Respondent was also wrong to come to the conclusion that the Appellant had reported a dispute on the terms of the 'Collective Agreement 2020', issues which had been canvassed but not agreed during the negotiation process leading to the collective agreement or issues which have not been canvassed during the negotiation process leading to the collective agreement.*
- (d) *Appellant avers that the dispute is principally in relation to terms and conditions of his contract of employment which are in breach of the 'Collective Agreement 2020'. Appellant is not seeking to challenge the terms and conditions of the 'Collective Agreement 2020'.*
- (e) *Appellant further avers that the issue of Leave without pay was not even raised or canvassed at the negotiations between MALPA and the Joint Administrators. This is a condition which has been imposed by*

the Joint Administrators in breach of the conditions negotiated and agreed in the 'Collective Agreement 2020'.

(f) It is the contention of the Appellant that the condition and decision of the Joint Administrators and Air Mauritius Ltd (presently under Administration) to send him on Leave without Pay is illegal and in breach of the 'Collective Agreement 2020' which is binding on the Joint Administrators and Air Mauritius Ltd (In Administration).

35. *Appellant also avers that the condition in his contract of employment providing that he can be put on leave without pay when so decided by the Joint Administrators and Air Mauritius Ltd (In Receivership) is illegal being in breach of Section 72 and/or Section 72A of the Workers' Rights Act 2019 as subsequently amended.*

36. *Appellant further avers that the other issue in dispute is the failure of the Joint Administrators and Air Mauritius Ltd (In Administration) to pay him his 'End of year Entitlement Contract Gratuity' of 25% of the yearly basic salary which was supposed to be paid on the anniversary date of the contract.*

37. *Appellant avers that in light of the above, the Respondent was wrong to reject the dispute reported by the Appellant on the grounds as stated above.*

The Tribunal shall first consider the rejection of the dispute under *section 67 (2)* of the Act. This particular section provides that a person shall not report a labour dispute under *section 64* on matters relating to wages and terms and conditions of employment, which *'(a) are contained in the collective agreement; (b) have been canvassed but not agreed upon during the negotiation process leading to the collective agreement; or (c) have not been canvassed during the negotiation process leading to the collective agreement.'*

As per the letter dated 7 December 2020 from the Respondent, save for quoting the aforementioned *sub-section*, there has been nothing stated to suggest why the labour dispute has been rejected under this ground. It is clear that *section 67 (2)* of the Act provides for three alternate/disjunctive circumstances under which a labour dispute cannot be reported to the President of the CCM (i.e. *section 67 (2) (a), (b) or (c)*). In evidence before the Tribunal, the Appellant confirmed that the issue of leave without pay did not form part of the Collective Agreement and was not even raised of the purpose of same. However, nowhere has this been stated by the Respondent in his letter dated 7 December 2020 in rejecting the dispute.

Moreover, the President of the CCM, in relying on *section 67 (2)* of the *Act*, has not specified the limb he is invoking to reject the report of the dispute made by the Appellant and has only made a general reproduction of this particular *sub-section*. The Appellant cannot therefore be said to be in a situation of certainty regarding the precise limb of *section 67 (2)* of the *Act* being invoked against him by the Respondent.

The Tribunal, therefore, cannot find this ground of rejection to be sufficiently particularised as to the exact *sub-paragraph* under which the Respondent is rejecting the dispute. Thus, the Tribunal cannot find the decision of the President of the CCM to reject the reporting of the Appellant's labour dispute under *section 67 (2)* of the *Act* to be valid and revokes the decision taken to reject the report of the labour dispute under this particular *section* of the *Act*.

The President of the CCM has also invoked *section 64 (2)(a)(ii) & (iii)* of the *Act* in rejecting the report of the Appellant's dispute. This notably provides that a dispute shall not be reported to the CCM unless meaningful negotiations have taken place and a deadlock has been reached. It would be useful to note that the terms '*meaningful negotiations*' are now defined in *section 64 (2)(b)* of the *Act* as follows:

64. Reporting of labour disputes

(2) (a) ...

(b) *In this section –*

“meaningful negotiation”–

(a) *means meeting, discussing or bargaining in good faith between parties with a view to finding mutually acceptable solutions; and*

(b) *includes access to information, within a reasonable time at the request of either party.*

A perusal of the Labour Dispute Form submitted by the Appellant in this matter notably reveals that the Appellant inserted '*There were two meetings at the conciliation and mediation section of the Ministry of Labour about the dispute*' at section 6 of the form, when asked '*Explain what has been done to try to solve the dispute*'. The mere citing of two meetings held regarding the dispute does not actually fit into the attributed meaning of meaningful negotiations under

the Act. As per the definition reproduced above, the meetings must be held with a view to finding mutually acceptable solutions. It should be noted that the Appellant recognised that there is no mention of discussions with the employer in the dispute form. Moreover, the element of '*finding mutually acceptable solutions*' is not present, in one form or another, in the particulars inserted by the Appellant at section 6 of the Labour Dispute Form.

Moreover, the Labour Dispute Form does not mention that a deadlock has been reached between the parties. This has not been disputed by the Appellant. Nor is same to be found in the annexes attached to the dispute form which were produced before the Tribunal. The Appellant, as per his Statement of Case, has referred to paragraphs 30 to 32 thereof to demonstrate that there were meaningful negotiations between the parties and that a deadlock was reached (vide paragraph 34 (a) thereof).

The Tribunal has noted that paragraph 30 avers that the Appellant raised the issue of, *inter alia*, leave without pay with his superiors and the Executive Vice President (HR) Mr Jolicoeur. He was directed to the Joint Administrators, who turned a deaf ear to numerous emails sent to them. As per paragraph 31, the assistance of the Ministry of Labour was sought and a deadlock was reached after two meetings as the Joint Administrators refused to amend the offending clauses of his contract of employment. Paragraph 32 simply states the MALPA (the Pilots' trade union) sought to negotiate with the Joint Administrators to find an amicable solution, but received a negative reply.

Although the Appellant may have set a more detailed collection of the events and issues relating to his labour dispute in his Statement of Case, same was not provided to the President of the CCM in the Labour Dispute Form submitted for the reporting of his dispute. The Appellant has, in effect, attempted to introduce new elements relating to the dispute and its background before the Tribunal, when same were never raised or brought to the Respondent's attention at the time of the reporting of the dispute. The Tribunal cannot therefore rely on the averments made at paragraphs 30 to 32 of the Appellant's Statement of Case.

In evidence before the Tribunal, the Appellant notably stated that he did mention that there was a deadlock in the covering email (Document A) he sent to the President of the CCM. However, a perusal of the email produced reveals that it was primarily addressed to a certain Ms R. Jootoo, a Labour & Industrial Officer at the Conciliation and Mediation Section of the Ministry

of Labour and not to the CCM or its President. In any event, mention of the deadlock in the meeting with the employer should have been made in the Labour Dispute Form.

It has also been noted that the Respondent has relied on *section 65 (1)(d)* of the *Act* in rejecting the report of the Appellant's dispute. This notably provides that the President of the CCM may reject the report of a dispute where he is of the opinion that the party reporting the dispute has failed to comply with the dispute procedures specified under the *Act* or provided for in a procedure agreement.

The word 'or' in *section 65 (1)(d)* is used to separate '*failure to comply with the dispute procedures specified in this Act*' and '*dispute procedures ... provided for in a procedure agreement*'. This implies that the two given circumstances are disjunctive from each other and cannot implied to be similar (vide *section 5 (5)* of the *Interpretation and General Clauses Act*).

Although the Tribunal has noted that the President of the CCM has not provided any particulars as to the circumstance he is relying upon to reject the dispute under *section 65 (1)(d)*, it is clear that he could not have relied on the failure to comply with dispute procedures provided in a procedure agreement as no procedure agreement was included in the annexes attached to the Labour Dispute Form. Nor is same annexed to the Collective Agreement of 2020 (Document D) produced by the Appellant before the Tribunal.

The Tribunal can therefore be satisfied that the President of the CCM relied on the Appellant having failed to comply with the dispute procedures specified under the *Act* to reject the report of the dispute under *section 65 (1)(d)* of the *Act*. The failure of the Appellant, in this regard, would be its lapsus under *section 64 (2)(a)(ii) & (iii)* of the *Act* as previously discussed. Thus, by invoking *section 65 (1)(d)* of the *Act*, the President of the CCM has the power to reprimand the Appellant's failure to follow dispute procedures provided under the *Act*.

The Tribunal has further noted that the Appellant, at paragraph 34 (b) of his Statement of Case, has relied on paragraphs 30 to 32 thereof to aver that the Respondent was wrong to reach the conclusion that it did. Having previously considered the three paragraphs *in lite*, the Tribunal, for reasons already given, cannot rely on same in support of the present appeal. Thus, the Tribunal cannot fault the Respondent in deciding to reject the report of the labour dispute under this specific section of the law.

It was also contended, on behalf of the Appellant, that there was no meeting held at the CCM prior to the rejection of the labour dispute. As rightly submitted by State Counsel appearing for the Respondent, there is no legal obligation under the *Act* for the President to hold a meeting prior to rejecting a dispute. It should be noted that *section 65 (1)* of the *Act* clearly permits the Respondent to reject the report of a labour dispute where he is of the opinion that the circumstances listed in (a) to (f) of the aforementioned *sub-section* are present.

Moreover, it is only when the dispute has not been rejected or that the rejection has been revoked on appeal that the Respondent can proceed with the process of promoting a settlement between the parties to the dispute (*vide section 69 (1)* of the *Act*). The Tribunal has also noted that the argument of no meeting being held at the CCM has not been invoked as a ground, as per the Appellant's Statement of Case, in this appeal.

During the hearing of the present appeal, there was some confusion as to the date the Appellant reported his dispute to the CCM. As per the email (Document A), he submitted the Labour Dispute Form on 19 November 2020 by email. However, as per the CCM's records, the form was received on 2 December 2020 and this is the date, as per their records, when the dispute was reported. Whatever be the date of the reporting of the dispute, this is not material to the present appeal as the Appellant had 21 days to lodge same as from the notification of the rejection of the report of the dispute on 7 December 2020.

The Tribunal, having duly considered the contents of the Respondent's letter dated 7 December 2020, would wish to observe that the Respondent has, save for setting out different sections of the law relied upon to reject the report of the labour dispute, not given any reasons to supplement or elaborate the legal provisions cited. The CCM, being a public body and in the realm of public law, is bound observe certain standards.

Indeed, it would be appropriate to note what was stated by the Supreme Court in the matter of *Dr V. Gujadhur v The Medical Council of Mauritius* [2013 SCJ 399b]:

The public body is duty bound under the rule of law and in the exercise of the power vested upon it by parliament to act judiciously and not arbitrarily, rationally and not irrationally, legally and not illegally, within its powers and not outside them.

Moreover, as a matter of fairness to the Appellant and in general, the President of the CCM could strongly consider providing reasons as to how he has reached the decision to reject the report of the labour dispute although the law does not oblige him to do so. It cannot be overlooked that the giving of reasons '*is one of the fundamentals of good administration*' (vide *Breen v AEU* [1971] 2 QB 175, 191 (Lord Denning MR)). The CCM is an administrative body created by statute and giving reasons can only enhance its decision making process with regard to its stakeholders.

In *R v Home Secretary, ex p Doody* [1994] 1 AC 531, it was held that fairness may in some situations require the giving of reasons, because of the impact of the decision on the individual's rights and interests. It would be apposite to note what was stated by Lord Mustill in this leading House of Lords case:

The giving of reasons may be inconvenient, but I can see no grounds at all why it should be against the public interest: indeed, rather the reverse. That being so, I would ask simply: Is refusal to give reasons fair? I would answer without hesitation that it is not.

The Tribunal, having considered the grounds of rejection in the Respondent's notice dated 7 December 2020 as well as the arguments put forward by the Appellant during hearing of the present appeal, thus confirms the decision of the President of the CCM insofar as the rejection of the report of the labour dispute under *sections 64 (2)(a)(ii) & (iii) and 65 (1)(d) of the Act* is concerned.

The appeal is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

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SD Vijay Kumar Mohit
(Member)

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SD Karen K. Veerapen (Mrs)
(Member)

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SD Arassen Kallee
(Member)

Date: 24th February 2021