

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 105/2020

Before: -

Shameer Janhangeer	Vice-President
Raffick Hossenbaccus	Member
Jeanique Paul-Gopal (Mrs)	Member
Ghianeswar Gokhool	Member

In the matter of: -

Mr Luximun BADAL

Disputant

and

MAURITIUS POST LIMITED

Respondent

The present matter has 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*. The Terms of Reference of the dispute read as follows:

Whether I, Luximun Badal, President of the Union of Post Office Workers Branch No.2 (The Union) and Postman at MPL, summarily dismissed on 18 June 2020, should be reinstated in post as Postman pursuant to Section 64 (1A) (d) of the Employment Relations Act (as amended).

The Disputant was assisted by Mr Narendranath Gopee, President of the Federation of Civil Service and Other Unions. The Respondent was assisted by Counsel Mr Rishikesh Hurdoyal, who appeared together with Mr Yovin Foolessur. Both parties have submitted their respective Statements of Case with regard to the present dispute.

THE DISPUTANT'S STATEMENT OF CASE

The Disputant has notably averred that he served as a Postman for 32 years and is also the President of the Union of Post Office Workers Branch No.2 (the "Union"). The Union represents certain grades at the Mauritius Post Limited ("MPL") and is affiliated to the Federation of Civil Service and Other Unions. As a trade unionist, the Disputant has a number of responsibilities under the Act. In September 2013, he was posted to Central Mail Office ("CMO") Delivery in Port Louis upon his request. On 27 January 2016, he reported a number of issues as President of the Union to the Respondent's Human Resource Executive regarding occupational safety and health. On the next day, he was informed of a change in his posting to Terre Rouge Post Office by the aforesaid Executive. The Disputant subsequently reported a disputed to the Ministry of Labour (the "Ministry"). Thereat, a joint meeting was convened with the Respondent under the chair of Mr Caremben, Assistant Director at the Ministry. The Respondent agreed to withhold the change in posting and not to transfer him as long as he is President of the Union.

The Collective Agreement was to lapse on 31 December 2017 and there was a need to engage in fresh negotiations with management for a new Collective Agreement. On 15 February 2018, the Union was handed a report on revised terms and conditions of employment worked put by the Salary Commissioner, BCA Consulting. The report contained certain omissions regarding terms and conditions of the grades of Operation Manager to Corporate Affairs and Administrative Manager. The Respondent was requested to provide this missing information in order to work out a fair and balanced salary relativity. This was refused. The Disputant then sought an order for disclosure by applying to the Tribunal, which awarded same on 18 October 2018.

On 6 November 2018, the Disputant was informed of a change in posting from CMO Delivery to Bambous Post Office with effect from 8 November 2018. On 12 November 2018, in

a meeting with the Respondent's Chief Executive Office, he requested that the change in posting be reviewed. This request was not attended to. The Respondent refused to execute the order of the Tribunal and the Federation, by letter dated 22 November 2018, reiterated its request for the Respondent to provide the missing information. By letter dated 26 November 2018, the Disputant was informed of his suspension for having failed to assume duty at Bambous Post Office. The Respondent's staff, by Circular Note 23 of 2018, were informed of the Disputant's suspension and that he should be denied access to any post office. The Federation requested, in a letter addressed to the Ministry, that a joint meeting be convened regarding the Disputant's suspension. The Disputant was convened, by letter dated 3 December 2018, to appear before a disciplinary committee on 14 December 2018.

Despite several other Postal Officers being informed of a change in posting and not abiding by same, no disciplinary action was taken against them. The Ministry convened a joint meeting scheduled for 21 December 2018. The Respondent refused to stay the disciplinary committee pending the determination of the joint meeting and called upon the Disputant to attend a disciplinary committee on 8 February 2019. The joint meeting was finally held on 8 February 2019, under the Chair of the Honourable Minister of Labour. The Honourable Minister thereafter instructed the President of the CCM to conduct an enquiry on the state of industrial affairs at the Respondent under *section 89* of the *Act*. There were several disciplinary committees held between 14 December 2018 and 15 June 2020. The Disputant, being sick and having submitted a medical certificate, could not attend the meeting of the 15 June 2020. However, the committee was maintained and proceeded in the Disputant's absence.

By letter dated 18 June 2020, the Disputant was informed that his employment was terminated with immediate effect after the committee found the charges to be proved. The Disputant appealed against the termination of employment and was informed that his appeal had been referred to the Board as per the Respondent's terms and conditions. The Board, at its meeting of 3 July 2020, upheld the decision of the committee. The Disputant considers this decision to be *ultra vires* as it is the same Board that had approved the termination.

To conclude, the Disputant has notably averred that the Respondent has failed to distinguish in his capacity as an employee and as a trade unionist; he was badly viewed as a trade unionist when the dispute over non-disclosure of information was made to the Tribunal; the charges preferred against him were frivolous, vexatious and tainted with ulterior motives; the Respondent, in terminating his employment, wanted to do away with the Union and its

President; the Respondent was aware that it could not initiate disciplinary proceedings against him as President of the Union and resorted to his status of employee to terminate his employment; the Respondent, in terminating his employment, has deprived him of his right to decent work and decent living; the Respondent has acted in breach of the principles of natural justice; and the Respondent is in breach of principles and best practices of good employment relations by conflating his two distinct capacities. The Disputant is therefore appealing to the Tribunal for an award to reinstate him in his former post as Postman.

THE RESPONDENT'S STATEMENT OF REPLY

The MPL has notably averred that the Disputant is no longer an employee since 18 June 2020 and takes note that he is still a trade unionist. The Disputant request to change posting from Bambous to Port Louis was entertained as he had changed address to Port Louis and was not made to allow him to meet the exigencies of his responsibilities as a trade unionist. The Disputant was, however, allowed to benefit from 2 days' time-off for his union activities. Regarding the Disputant's transfer from CMO Delivery to Terre Rouge, same was done to meet the exigencies and requirements relating to its business as is allowed under Article 2 of the Procedure Agreement.

In relation to the Notes of Meeting dated 18 February 2016, the Respondent avers that same was only handed over to them in a meeting on 26 December 2018 by Mr Caremben. They had never received same before. On 19 February 2016, a correspondence was sent to the Permanent Secretary of the Ministry showing that the contents of the notes are in contradiction with the Respondent's letter dated 19 February 2016. The Notes of Meeting were not signed by all parties and there is no agreement in accordance with *section 68 (2) of the Act*. Regarding the Collective Bargaining exercise, only the report for the grades of Handy Worker to Assistant Operations Manager was handed over to the unions. The termination of the Disputant's employment has nothing to do with the disclosing of personal information. The Respondent reiterates that it has the sole discretion to effect any transfer to meet the exigencies and requirements in relation to its business. The Respondent did not have any obligation to attend the Disputant's request to review the transfer.

Regarding the Tribunal's Order dated 18 October 2018, the information was being compiled and same was eventually submitted to the unions. The Disputant was suspended with immediate effect pending an internal investigation with respect to the negative conduct and attitude of the Disputant in relation to his change in posting. It has been a long established practice to notify employees of any suspension/termination and the Respondent had no intention of tarnishing the Disputant's reputation. The disciplinary committee was convened for the Disputant to answer charges relating to gross misconduct. The transfers of other employees were effected and some were recalled due to exigencies and requirements of service. Regarding the meeting, on 25 January 2019, at the Ministry, the Respondent did inform the Chairperson of same that it decided to proceed with the disciplinary committee.

The Respondent further avers that there was a meeting with the Honourable Minister of Labour, whereby it reiterated that a disciplinary committee had already started and it would be most appropriate for the Disputant to answer the charges levelled against him before the committee. The Honourable Minister referred the matter to the CCM. Although the Disputant is President of the Union, he was also an employee and was subject to the same rules and regulations applicable to all members of staff. In the meeting on 8 February 2019 chaired by the Minister, it was not agreed to revoke the disciplinary committee. The Chair of the disciplinary committee was an independent person even though he was not a Judge, Magistrate or Barrister. It is management's prerogative to deal with cases of gross misconduct. The Board does not approve termination following the completion of a disciplinary committee and only considers appeals against termination of employment.

It has also been averred that the Disputant was given the opportunity to answer all charges levelled against him, but he tried at all times to avoid the disciplinary committee by having recourse to applications before other forums or sending medical certificates. The Disputant sought an injunction to stop the Respondent from proceeding with the committee and this was set aside. Disputant also lodged plaint before the Supreme Court and subsequently withdrew same. Disputant had changed his legal representatives on more than three occasions with a view to delay the committee. The committee started in December 2018 and ended in June 2020 due to the Disputant's whims and caprices. The Respondent had no other alternative than to terminate the Disputant's employment due to gross misconduct following the findings of the committee and in accordance with the law.

THE EVIDENCE OF WITNESSES

Mrs Jyotee Prayagsingh, Senior Labour Officer, adduced evidence on behalf of the Disputant by producing the notes of a meeting (Document A) held on 18 February 2016 at the Ministry of Labour. In cross-examination, she stated that she was not involved in the meeting and is not aware whether the document produced was sent to the Respondent for verification and approval.

Mr Mariahven Caremben, Advisor in Industrial Relations and Policy Matters at the Ministry of Labour, Human Resource Development and Training, was also called to depose on behalf of the Disputant. He knows Mr Badal as President of the Union of the Mauritius Post. He chaired the meeting of February 2016 at the Ministry with a Labour Industrial Officer, which involved the issue of the transfer of Mr Badal. As per normal procedure, when meetings are held at the Conciliation and Mediation Section of the Ministry, no Notes of Meeting are circulated among parties. As per the Notes of Meeting, it is stated that as long as Mr Badal is President of the Union, he cannot be transferred.

Upon questioning from the Respondent's Counsel, Mr Caremben notably stated that everything said in the meeting was written and a genuine report was submitted to the Director of Labour and Industrial Relations. The Notes of Meeting produced was submitted to the Director. If a matter is settled and there is no request from the parties that an agreement be signed, the Notes of Meeting is deemed to be the agreement and the case is settled to the satisfaction of the parties. This has always been the case that when there are individual issues; for collective issues, the agreement is prepared, ratified and signed by all parties. No agreement was signed.

Mr Caremben was, moreover, referred to a letter dated 15 February 2016 from the Respondent addressed to him (produced as Document B). He was referred to another letter dated 19 February 2016 from the Respondent, which states that Mr Badal will not be transferred as long as he is President of the Union. As far as he can recollect, there was no reply to the letter dated 19 February 2016 from the Ministry. He reiterated the practice at the

Ministry that no notes are given to the parties unless the parties request for same and an agreement is prepared at the Ministry and signed by both parties.

Mr Luximun Badal, Postman, was called to depose. He notably stated that in 2013, he was posted at Flic en Flac and asked for a transfer to Port Louis to enable him to perform his work as a trade unionist. He denied that he changed his address from Bambous to Port Louis and this is why he asked to be transferred in 2013. In January 2016, he received complaints from workers which he took up with management and the next day he was given a transfer to Terre Rouge Post Office. This is because he did his union work as President. He talked to management, who were not agreeable. He went to the Labour Office, where there were meetings held with the Respondent's management and himself on 18 February 2016 chaired by Mr Caremben. It was decided by management not to transfer him and that he remain in Port Louis to do his union work.

The Disputant further stated that as President of the Union, he represented the grades of Assistant Postman, Postman/Senior Postman and Inspector of Postman in the Collective Bargaining exercise of 2018 and received the terms and conditions of service worked by the Salary Commissioner. He observed that there were many omissions regarding terms and conditions and needed information to verify relativity of pay. He requested same from management and this was refused. He, thereafter, applied to the Tribunal, which ordered the Respondent to furnish same on 18 October 2018. Management was still reluctant to give him the information. He phoned management on 5 November asking that they abide by the order and to his great surprise, the next day, he was given a transfer to Bambous Post Office. He is convinced that because he made this demand he was transferred.

Mr Badal, moreover, stated that on 22 November 2018, he made the Federation make a last request to management for the information and on 26 November 2018, he was interdicted from duty. It is because of his work as President of the Union, he was suspended. On 28 November 2018, a circular was issued notifying all staff of his suspension and that he cannot enter into any Post Office. He was also not given access as President of the Union to do his union work. He wrote to the Permanent Secretary of the Ministry of Labour regarding his suspension asking for a meeting, which was convened for 8 February. In the meantime, management had written to him convening him before a disciplinary committee.

Mr Badal went on to state that there was a meeting presided by the Minister of Labour with the Respondent's representatives. The Respondent did not agree to revoke his suspension and the matter was referred to the CCM. At the CCM, the Respondent did not agree to his reinstatement. The Respondent stated that it did not recognize the engagement taken in the meeting of 18 February 2016 and the disciplinary process continued. On 18 June 2020, he received a letter from the disciplinary committee signed by the Human Resources Manager, Mr Pravin Ballyraz, that his contract of employment with MPL is being terminated after 32 years of service. He appealed to the Board, which rejected his appeal.

Mr Badal is asking the Tribunal for his reinstatement as he has not yet completed 33 years of service and has 3 years of work left. He is indebted to the Mutual Aid, the Civil Service Federation and his children are undertaking studies. He has to care for his six-year-old child. He made demands as President of the Union for his members, which management did not see as correct and found a way to fire him. He did not fault as a Postman. It is because of the union work he did, asking for the pay of top management. His termination is unjustified and that is why he is asking for reinstatement.

Mr Badal was cross-examined by Counsel for the Respondent. He notably replied that he has had no problems with the Respondent as a Postman. He is not aware that around the end of 2015 he had problems with staff working with him. He does not remember being conveyed before a disciplinary committee. In January 2016, he was transferred to Terre Rouge Post Office. He approached management regarding the transfer and then referred the matter to the Labour Office, where it was decided not to transfer him. He was referred to a letter dated 15 February 2016 (Document B), whereby it is stated that his transfer was being withheld temporarily. The letter was not addressed to him and he is not aware of same. He was referred to another letter dated 19 February 2016 (at Annex 2 of the Respondent's Statement of Reply), but could not state what '*... in the current circumstances*' mentioned therein meant.

Mr Badal further replied that he is asking for reinstatement at work as the Respondent took action against him as a Postman. All the demands he made were as President of the Union, but action was taken against him as a Postman. He did not fault as a Postman. He asks himself why the Respondent took action against him as Postman, when he was doing the work of President of the Union. There was a disciplinary committee instituted against him on charges of gross misconduct. He attended same twice and on the last occasion, he was sick and produced

a medical certificate. He received a letter on 18 June 2020 informing him that the charge has been proved. His appeal was dismissed.

Mr Badal also stated that he had entered an injunction against the disciplinary committee before the Supreme Court, which was dismissed. He cannot recall if other cases were also entered before the Supreme Court. When the matter was set aside, his Attorney wrote to say that they are withdrawing all cases. The Respondent had faulted and his recourse was against this. His rights have been breached that is why he is before the Tribunal. Action was taken against him as Postman, this is why the Respondent has faulted against him. No bond of trust between him and the Respondent has been breached.

Mr Biswajit Khadun, Acting Human Resources Executive, deponed on behalf of the Respondent. He notably stated that Mr Badal was transferred from CMO Delivery to Terre Rouge as there was an incident involving him and two others. Mr Badal sought recourse from the Ministry of Labour, where it was decided to temporarily withhold the transfer. However, Mr Badal did not agree to the word '*temporary*'. There was another meeting whereby the aforesaid word was removed and replaced by '*... current circumstances*' as per the letter dated 19 February 2016. A disciplinary committee had been instituted against Mr Badal following the incident. They had no opportunity to vet the Notes of Meeting following the meetings at the Ministry. The Notes of Meeting were handed over to them on 26 December. The matter was settled according to the letter dated 19 February 2016. The disciplinary committee was still ongoing and its outcome was a warning for Mr Badal.

Mr Khadun also stated that there was a second disciplinary committee instituted in December 2018 against Mr Badal for his work as Postman. Management took the decision to terminate Mr Badal's contract. The disciplinary committee was postponed on no less than 16 occasions and finished in June 2020. Mr Badal had recourse to the Ministry of Labour, the Minister himself, entered an injunction before the Judge in Chambers and the Supreme Court. There is no bond of trust between the Respondent and Mr Badal. Mr Badal was transferred to Bambous Post Office, but he did not report there and reported to CMO Delivery instead. This was viewed as misconduct and a disciplinary committee was instituted. Mr Badal was dismissed as Postman and not for his trade union activities. Mr Badal is no longer an employee of the Respondent. He also produced the letter dated 19 February 2016 (Document C).

Mr Khadun was thoroughly questioned by the Disputant's trade union representative. He confirmed as to the veracity of the Respondent's Statement of Reply. He agreed that Mr Badal, in 2013, changed his address to Port Louis to be transferred there. He agreed that before the CCM (vide Annex 19 of the Disputant's Statement of Case), he stated that this happened in 2016 and that the transfer was in 2016, not 2013. He maintained that when one asks for a transfer, it is made close to his residence as he had stated to the Commission. Mr Badal was transferred to Terre Rouge on 28 January 2018. He agreed that the transfer was made to meet exigencies and requirements of the Respondent's business. He agreed that he stated before the Tribunal in the present matter that the transfer to Terre Rouge was made because of an incident involving the Disputant. He could not reply on the exigencies of the transfer. When a Postman is transferred, he would need one to two weeks to be trained. He agreed that there were other Postmen leaving at Terre Rouge. Mr Badal and other officers concerned in the incident at CMO Delivery were transferred to maintain a harmonious working environment.

Mr Khadun was referred to the letter dated 19 February 2016 (Document C), which is nearly the same as the letter dated 15 February 2016 (Document B) except for the word '*temporarily*', which was removed in the former letter and replaced by '*in the current circumstances*'. Document C does not mention that the word '*temporarily*' has been replaced by '*current circumstances*'. He denied that '*current circumstances*' meant the decision taken at the Conciliation and Mediation Committee. According to the Notes of Meeting of 18 February 2016 (Document A), the matter of Mr Badal's transfer was settled. Despite what is stated in the Notes of Meeting, the matter was not settled referring to the letter dated 19 February 2016. The Respondent agreed to remove the word '*temporarily*' and withhold the transfer of Mr Badal. He did not agree that the transfer was revoked as the Respondent had faulted regarding same. The Notes of Meeting were handed to the Respondent on 26 December 2018 at the Ministry of Labour.

Mr Khadun further stated that he could not contest the Salary Commissioner's report circulated to the trade unions during the collective bargaining exercise in 2018 and was not aware of any shortcoming therein. The Union asked for the salaries of higher officers, which was eventually submitted. He agreed that the Union applied to the Tribunal for the information, which ordered disclosure of the information. Management did not refuse to give the information, it was being complied and was finally given. Transfer is a prerogative of management and it may have coincided with the request of the Union for the information. He did not agree that in transferring Mr Badal, the latter's work as a unionist was hampered. Mr Badal received two full days' time-off and a half day on request for his union activities since 30

January 2017. A transfer policy exists; transfers are made to motivate employees and to bring them near to their residence. The Union is not consulted (regarding transfers) but informed.

Mr Khadun also stated that an employee from Bambous Post Office was promoted and the Disputant was transferred to take his place. As Mr Badal did not assume work, the work was performed by an Assistant Postman. An Assistant Postman has a different scheme of service to a Postman. There was a lack of Postmen at Bambous and the grade had to be replaced by the like. The disciplinary committee started in December 2018. The Respondent did not stop Mr Badal from carrying out his union activities even when he was suspended. Mr Badal was never stopped from giving help to a deceased employee at the post. He was referred to a Circular Note dated 28 November 2018 (vide Annex 10 of the Disputant's Statement of Case). He stated that the Note does not mention Mr Badal as President of the Union, was made as a matter of long standing practice when an employee is suspended or his employment has been terminated and was meant for staff notification. He denied that Mr Badal was not given any access to any Post Office as President of the Union.

Under re-examination from Counsel for the Respondent, Mr Khadun notably stated that Mr Badal was transferred as a Postman, not as a trade unionist. The Circular Note dated 28 November 2018 refers to Mr Badal's duties as a Postman and only concerns him as a Postman. All the information he gathered was from the personal file of Mr Badal and he has not invented anything and this is what was put into the Statement of Reply.

THE PARTIES' SUBMISSIONS

Mr N. Gopee notably submitted on behalf of the Disputant that the term '*participating in trade union activities*' as laid down in *section 64 (1A) (d)* of the Act must be given a wide construction, which resonates with the Disputant's day-to-day activities. The acts of the Disputant as an active member and President of the Union are external to his duties, responsibilities and obligations under his contract of employment. Although the Respondent cannot sanction a trade unionist, it suffices for an employer to find an excuse to make a case against the employee, who is also a unionist, to bring him before a disciplinary committee, which is used as a shield to dismiss him. The evidence of Mr Caremben, as do the Notes of Meeting, make clear that there was a settlement before the Ministry of Labour. This is

confirmed by the Respondent's letter dated 19 February 2016. The evidence of Mr Khadun on this issue is a fabrication of a lie which defeats his credibility.

It was also submitted that Mr Khadun also attempted to mislead the Tribunal in relation to the Disputant's request for a transfer from Flic en Flac Post Office to CMO Delivery Port Louis. Mr Khadun also digressed regarding his evidence on the change of post of the Disputant from CMO Delivery to Terre Rouge Post Office. Based on this inconsistency, it can only be inferred that the Respondent wilfully and knowingly exercised its discretion to transfer the Disputant in a deliberate attempt to minimise its responsibilities towards the Union. Regarding the Disputant's transfer to Bambous Post Office, Mr Khadun could not provide a clear and trustful reply when asked to elaborate on the reason of exigencies in relation to its business. Usual delivery services were attended to by an Assistant Postman during the time the Disputant was suspended. Mr Khadun also lied on the time-off granted to the Disputant to carry out his trade union activities. As per the Circular Note No. 23/2018, the Disputant was only allowed access to any Post Office as a customer. Mr Khadun has no credibility as a reliable witness.

The acts and doings of the Respondent from January 2016 were a well-oiled mechanism to fetter the Disputant's freedom culminating in the disciplinary proceedings and termination of the Disputant's employment. It is trite law that the Tribunal has no jurisdiction over disciplinary matters, which fall squarely under the ambit of the Industrial Court. This has been recognised in *Sunassee and Airports of Mauritius Co Ltd (ERT/RN/97/20)*. The Respondent therefore pleading irrelevant matters related to discipline is tantamount to an abuse of process.

The gist of the Disputant's case lies with the unreasonable decision, in the *Wednesbury* sense, to terminate the Disputant's employment following his refusal to comply with the transfer to Bambous Post Office. The Respondent has acted in breach of its own pledge before the Ministry of Labour and cannot be viewed as a defiance against authority. The termination of the Disputant's employment is a strong signal to other workers and office bearers of the trade union. The Tribunal must be alive to the abusive use of disciplinary committee by the Respondent to sack workers. Mr Khadun's evidence that the bond of trust has been no longer exists between Mr Badal and the Respondent is inconsistent with his reply that the Respondent had not received any adverse report against the Disputant as Postman.

It has been submitted that the Disputant has reason to believe that it has proved that the bond of trust between the Respondent and himself has not been broken; the decision of the Respondent to terminate Disputant's employment is unjust, irrational and unreasonable; the Respondent has damaged industrial relations with the Union and this needs to be re-established; the Respondent adopted a double standard in only targeting the Disputant among all the other Postmen and Postal Officers who were transferred at the same time but never responded to same; the termination of the Disputant's contract of employment was pre-conceived and being cooked since 2016 as his every trade union act was met with a transfer and/or disciplinary action and ultimately, the termination of his employment after 32 years of loyal service. The Disputant is therefore praying for an award of reinstatement and for an order for payment of remuneration from the date of termination to reinstatement.

On the other hand, Counsel for the Respondent has notably submitted that the matter falls within the exclusive jurisdiction of the Industrial Court as it is the case for the Respondent that the termination of employment was never effected on the ground of the Disputant's activities as a trade unionist. The charges laid against the Disputant before the disciplinary committee were in his capacity of Postman. The Disputant was never interdicted from office following an alleged request for information to the Respondent; but was interdicted on the basis of disciplinary proceedings initiated against him.

It was further submitted that regarding the alleged agreement for the Disputant not to be transferred, the Respondent submitted that there was no such agreement. The Respondent withheld the transfer of the Disputant to Terre Rouge '*in the current circumstances*' and did not waive its prerogative to transfer Mr Badal. Moreover, the Disputant was dismissed following the conclusions of the disciplinary committee in his capacity as a worker and not as a trade unionist. Relying on the award of *Sunasse and Airports of Mauritius Co Ltd (supra)*, it was submitted that the Disputant has not proved that his employment was terminated on the ground of participating in trade union activities. Furthermore, the Disputant's reinstatement would not be conducive to its operations as the bond of trust between the two has irretrievably broken down.

THE MERITS OF THE DISPUTE

The Terms of Reference in the present matter is asking the Tribunal to enquire into whether the Disputant should be reinstated, following his dismissal on 18 June 2020, as Postman at the MPL pursuant to *section 64 (1A) (d)* of the Act, as amended.

The Disputant Mr Badal was employed as Postman with the Respondent. In 2013, he was transferred from Flic en Flacq Post Office to CMO Delivery, Port Louis. This enabled him to perform his work as a trade unionist being the President of the Union. Following issues raised with management, he received a transfer to Terre Rouge Post Office. Meetings were subsequently held at the Ministry of Labour with management and it was decided not to transfer him.

The Notes of Meeting dated 18 February 2016 (Document A), of a meeting chaired by Mr Caremben, notably state that the matter was settled and that *'as long as Mr Badal remains the President of the Union, he is not liable to any transfer thus he can carry out his activities as usual'*. It should be noted that the aforesaid notes were not signed by either party to the dispute and its veracity has been strongly contested by the Respondent in the present matter.

In relation to the Collective Bargaining exercise of 2018, the Union requested information from management regarding terms and conditions and relativity of salaries. Upon management's refusal, an application was made to the Tribunal to obtain same. The Tribunal ordered that the Respondent furnish the same. On 5 November 2018, he phoned management asking that they abide to the Order and the next day, he received a transfer to Bambous Post Office.

On 26 November 2018, he was suspended and also convened before a disciplinary committee. He referred the matter to the Ministry of Labour. However, the Respondent would not revoke his suspension nor agree to his reinstatement and pressed on with the disciplinary committee. On 18 June, he was informed that his contract of employment is being terminated.

The Disputant is therefore seeking reinstatement to the post of Postman before the Tribunal as per the Terms of Reference of the dispute. He is notably relying on *section 64 (1A) (d)* of the Act, which provides as follows:

64. Reporting of labour disputes

(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 –

...

(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;

The aforesaid provision clearly stipulates that no dispute on the reinstatement of a worker shall be reported where the termination of employment was effected by reason of a worker becoming or being a member of a trade union; seeking or holding of trade union office; or participating in trade union activities.

Moreover, it may be noted that with the enactment of the amendments made to the Act by the *Employment Relations (Amendment) Act 2019 (Act No. 21 of 2019)*, a labour dispute includes the reinstatement of a worker, where his employment is terminated on the grounds specified in *section 64 (1A)* of the Act.

It would be pertinent to note what the Tribunal stated in *Sunassee and Airport of Mauritius Co Ltd (supra)* in relation to the reinstatement of a worker under *section 64 (1A)* of the Act:

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.

It should also be noted that the Tribunal can only make an order for reinstatement in relation to termination of employment pursuant to *section 70 (2B)* of the Act after having found the claim to be justified on any of the grounds specified in *section 64 (1A)*. The present Terms of Reference is therefore, to a certain extent, misconceived in asking the Tribunal to find that the Disputant should be reinstated in relying solely on *section 64 (1A) (d)* of the Act. The Tribunal shall, however, proceed to examine the ground put forward for reinstatement in the present matter.

Section 64 (1A) (d) of the Act, as being relied upon the Disputant, comprises three limbs. As per the evidence adduced and submissions offered, it has been revealed that the Disputant is invoking having been dismissed for participation in trade union activities in having raised work-related issues with management as President of the Union.

In this context, the Tribunal finds it appropriate to consider what was held by the English Court of Appeal in *The Marley Tile Co Ltd v Shaw [1980] IRLR 25 CA* in relation to dismissal pursuant to trade union activities:

In determining whether an employee was dismissed on grounds of trade union activities, what has to be established is:

1. *For what reason or reasons did the company dismiss the employee and, if more than one, what was the principal reason?*
2. *Was the employee's conduct, which formed the only or the principal reason for dismissal, trade union activities?*
3. *If so, was it with the consent, express or implied, of the company?*

Although it has been noted that the present dispute is governed by Mauritian law, in citing this decision, the Tribunal bears in mind what was stated by the Learned Judges of our Supreme Court in *Periag v International Beverages Ltd.* [1983 MR 108]:

English case law, as we have observed, is based partly on specific statutory provisions and partly on the English common law. It is useful as a guide to illustrate the general direction taken by judicial thinking in England in order to reach just solutions in industrial disputes and it shows a similarity in the direction taken by French and Mauritian judicial thought.

The Disputant has notably submitted that the decision to terminate his employment is unjust, irrational and unreasonable. It must, however, be noted that the Tribunal cannot decide whether the termination of the Disputant's employment was justified or not. It is trite law that the Tribunal is '*required to enquire into the substance of the dispute that is referred to it and to make an award thereon and it is not empowered to enquire into any new matter that is not within the terms of reference of the dispute.*' (vide *Air Mauritius v Employment Relations Tribunal* [2016 SCJ 103]). The Tribunal, as the per the present Terms of Reference, must determine whether the Disputant's termination of employment was effected in defiance of the ground invoked under *section 64 (1A) (d)* of the Act.

As per the evidence on record, Mr Badal was suspended and subsequently convened before of a disciplinary committee for having failed to assume duty at Bambous Post Office following a transfer from CMO Delivery, Port Louis in or about November 2018. According to the Respondent's representative, Mr Badal reported to CMO Delivery when he had been transferred to Bambous Post Office and this was viewed as a misconduct. Before the disciplinary committee, he faced two charges of gross misconduct for having failed to attend duty at Bambous Post Office; and secondly, for having signed the attendance register of CMO Delivery, Port Louis when he was not required to do so.

At this juncture, it would be apposite to note that the Tribunal is not going into the workings or procedures of the disciplinary committee but is merely examining the evidence on record in relation to the issue of whether the Disputant was dismissed for participating in trade union activities.

The gist of the evidence on this issue emanates from Mr Badal himself, particularly when questioned by Counsel for the Respondent in the course of the hearing of the present matter. Mr Badal notably recognised that action was taken against him as a Postman despite the demands he made as President of the Union. It was also unequivocally stated by the Respondent's representative that Mr Badal was dismissed as a Postman and not for his trade union activities.

An issue much debated, during the course of the present hearing, is the alleged undertaking given by the Respondent, as evidenced by the Notes of Meeting dated 18 February 2016, not to transfer Mr Badal as long as he is President of the Union. The Tribunal has noted that the Notes of Meeting produced to this effect cannot be deemed to be an agreement between the parties as per the requirements set out under the *Act. Section 68* thereof clearly stipulates that an agreement to a dispute must be recorded in writing and be signed by the parties to a dispute as well as being registered with the Supervising Officer of the Ministry of Labour and the Tribunal.

The Tribunal has also noted the Respondent's divergent stance on this issue, notably asserting that the matter was settled as per its letter dated 19 February 2016 (Document B). Despite the evidence of Mr Caremben on behalf of the Disputant as to the procedure normally followed at the Ministry, the Tribunal cannot find that the alleged agreement set in the aforesaid Notes of Meeting to be in conformity with the law and would accordingly be reluctant to place much reliance upon same.

In any event, the transfer of Mr Badal is not being invoked as a trade union activity which has led to the termination of his employment. The issue that Mr Badal should not have been transferred as per the Notes of Meeting arose in the context of his transfer to Bambous Post Office. Furthermore, the dispute at hand is not whether Mr Badal was unjustly or unreasonably transferred to Bambous Post Office, but whether his employment was terminated for participation in trade union activities.

Mr Badal, in his evidence, notably contended that he has not faulted, even as President of the Union; he was doing his work as President of the Union making demands for his members; management did not see this well and found a way to put him out, but as a Postman he has not faulted. It was also submitted on his behalf that the termination of his contract was

pre-conceived by the Respondent and was being cooked since 2016, as his every trade union act was met with a transfer and/or disciplinary action and ultimately termination of employment.

Although the chronology of events as expounded by the Disputant before the Tribunal may lead one to believe that it is because of his acts and doings as President of the trade union that Mr Badal was transferred to Terre Rouge in 2016 and to Bambous in 2018, the version of the Respondent must, in all fairness, also be considered.

The first transfer, in 2016, from CMO Delivery, Port Louis to Terre Rouge Post Office occurred following an incident involving the Disputant and two other colleagues at CMO Delivery as per Mr Khadun. As a matter of fact, the transfer never actually materialised inasmuch as a settlement was reached before the Ministry of Labour as previously noted.

The Respondent put forward the reason of *'exigencies and requirements relating to its business'* in its Statement of Case to justify the transfer. Whereas, its representative, in evidence, stated that the transfer was because of the aforementioned incident. Despite having taken note of this discrepancy in the Respondent's version, the Tribunal, in accordance with the Terms of Reference of the dispute, is not mandated to enquire into the reasonableness of the transfer to Terre Rouge Post Office. Furthermore, this transfer, as has been previously noted, is not what led to the disciplinary committee eventually resulting in the Disputant's termination of employment.

As regards the transfer of Mr Badal to Bambous Post Office in November 2018, Mr Badal is convinced that it is because of the demands he made for information relating to relativity of salaries in the context of the Collective Bargaining exercise of 2018 that he was transferred. It should be noted that the Union had applied and obtained an order for the information requested to be disclosed on 18 October 2018. Same was still not forthcoming from management and when the Disputant called, on 5 November 2018, asking the Respondent to abide by the Order, he was transferred to Bambous on the next day.

As per the evidence of Mr Khadun, the information sought by the Union was eventually submitted and management did not refuse to disclose same. He also stated that transfer is a

prerogative of management and the transfer may have coincided with the request of the Union for information. The transfer did not hinder Mr Badal's work as a unionist as he benefitted from two-days' time-off and a half-a-day upon request per week. Mr Khadun also explained that as a Postman at Bambous Post Office was promoted, Mr Badal was transferred to replace him. The transfer of Mr Badal was as a Postman, not as a trade unionist.

The Disputant, in submissions, has also contended that the Respondent has acted against its pledge made before the Ministry of Labour. As previously considered, the Tribunal cannot attach much weight to the alleged undertaking as stated in the Notes of Meeting dated 18 February 2016 and thus cannot find that the Respondent was in breach of its own pledge. As for the Disputant's refusal to comply with the transfer to Bambous Post Office, this does not concern his activities as a trade unionist inasmuch as the transfer was made in his capacity as a Postman. It should also be reminded that the Tribunal is not mandated to enquire into the reasonableness of the decision to transfer Mr Badal to Bambous Post Office.

It has also been contended by the Disputant that his termination of employment sends a strong signal to other workers and office bearers of the trade union. The Tribunal is, in the present matter, concerned with whether Mr Badal should be reinstated on grounds of having been dismissed for having participated in trade union activities. Whether a strong signal is being sent to other workers and union office bearers is not for the Tribunal to enquire into and would be *ultra vires* the Terms of Reference.

It has also been asserted, in submissions, that the Respondent has made an abuse use of the disciplinary committee to sack workers. It should be noted that the procedure of a disciplinary committee is now regulated in accordance with the provisions of the *Workers' Rights Act 2019* and does not fall within the jurisdiction of the Tribunal as rightly borne out by the Disputant in submissions. The Tribunal has also noted that the Disputant sought an injunction before the Judge-in-Chambers against the setting up of the disciplinary committee and entered a plaint before the Supreme Court. It cannot be overlooked the disciplinary power of the employer is subject to the supervision and control of the Courts (*vide Rahman Ismael v United Bus Service [1986 MR 182]*). Thus, the Tribunal cannot find it appropriate for the Disputant to invoke this as a ground in support of the reinstatement being sought.

Whatever be the contentions of the Disputant, the Respondent has been adamant that Mr Badal has not been transferred or disciplined for his trade union activities, but that his employment was terminated upon the two charges of gross misconduct laid against him before the disciplinary committee in his capacity as a Postman.

Having considered the evidence on record, can it be reasonably concluded that Mr Badal was dismissed for participating in trade union activities? As previously noted, Mr Badal was dismissed following the conclusion of the disciplinary committee following charges of gross misconduct laid against him. These charges did not relate to Mr Badal's work as President of the Union at the Respondent. This is more so recognised by the Disputant himself, who very honestly stated that action was taken against him as a Postman, when he had acted as President of the Union. The Tribunal cannot therefore conclude that the two charges laid against Mr Badal related to his work as a trade union member nor can it be said that the charges were related to his trade union activities.

The Tribunal further notes that Mr Badal's conduct as per the charges laid against him did not concern his activities as a trade unionist. As previously considered, the first charge related to Mr Badal failing to attend duty at Bambous Post Office, whereas the second related to him signing in the attendance register of CMO Delivery, Port Louis. The line of Mr Badal's conduct, as may be gleaned *ex-facie* the charges, do not relate to his role as President of the Union despite any wide meaning that may be given to the term '*trade union activities*'. Despite the Disputant putting forward his conduct relating to his trade union activities as the actual reason for his dismissal, the Tribunal cannot infer same to be so from the charges laid against him before the disciplinary committee which eventually led to his dismissal.

It has also been submitted that the employer adopted a double standard in only targeting the Disputant among all the other Postmen and Postal Officers who were transferred. It should be noted that the Disputant has never substantiated this issue in his evidence in the present matter. It would not therefore be appropriate for the Tribunal to act on these unsupported submissions in addressing the matter of the Disputant's reinstatement. Moreover, the dispute concerns solely the Disputant and is not in relation to other employees of the Respondent.

The hearing has also raised the issue of a Circular Note No. 23/2008 dated 28 November 2018, whereby the Respondent's staff were notified of Mr Badal's suspension as Postman and that he should not be allowed access to any of its offices; and that access is only to be allowed at any Post Office as a customer. It must be noted that the Note was issued after the transfer to Bambous Post Office and the Disputant's suspension from work on 26 November 2018. The Tribunal cannot therefore see how the Note relates to the Disputant's termination of employment for having supposedly participated in trade union activities.

Having considered the evidence adduced by both parties, the Tribunal cannot reasonably come to the conclusion that Mr Badal's employment was terminated by reason of him participating in trade union activities as is being invoked under *section 64 (1A) (d)* of the *Act*. The ground upon which Mr Badal is seeking his reinstatement has thus not been established. The Tribunal cannot therefore order that Mr Badal be reinstated as a Postman at the Mauritius Post Ltd.

It has moreover been disputed whether the bond of trust between the Disputant and the Respondent has been broken without repair. The Tribunal has not found it necessary to enquire into this issue as it is only if the claim for reinstatement were found to be justified that it would have had to consider this specific factor (*vide section 70 (2B)* of the *Act*). As the claim for reinstatement was not found to be justified, it would be therefore futile to consider this issue. It should also be noted, in view of the unfavourable outcome of the present dispute, that the Disputant may also have recourse to the Industrial Court for unjustified termination of employment.

The present dispute is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

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SD Raffick Hossenbaccus
(Member)

.....
SD Jeanique Paul-Gopal (Mrs)
(Member)

.....
SDGhianeswar Gokhool
(Member)

Date: 22nd September 2021

