

EMPLOYMENT RELATIONS TRIBUNAL

ORDER

ERT/RN 191/2020

Before:

Shameer Janhangeer	-	Vice-President
Vijay Kumar Mohit	-	Member
Rabin Gungoo	-	Member
Parmeshwar Burosee	-	Member

In the matter of:

Mauritian Airline Pilot Association

Appellants

and

The President of the Commission for Conciliation and Mediation

Respondent

The present matter is an appeal against a decision of the President of the Commission for Conciliation and Mediation (the "CCM") rejecting the report of a labour dispute lodged pursuant to *section 66 of Employment Relations Act* (the "Act") as amended. The Mauritian Airline Pilot Association ("MALPA"), then Disputants, reported a dispute to the CCM against Air Mauritius (Administrator Appointed) Ltd on the following terms:

Whether an employer or an administrator can unilaterally decide to:

- *Reduce the emoluments (salary and allowances);*
- *Impose Leave Without Pay;*
- *Change the conditions applicable to promotions of certain category of employees.*

The Appellant Union has presently, by way of an email dated 22 December 2020, appealed to the Tribunal against the decision of the President of the Commission of 7 December 2020, whereby they were informed that the dispute reported to the CCM was 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. Glover, SC, together with Miss S. Chuong, appeared for the Appellant Union. Whereas Mr M.Y. Alimohamed, State Counsel, instructed by Mrs B.G. Oogorah, Senior State Attorney appeared for the Respondent.

THE APPELLANT'S STATEMENT OF CASE

The Appellant has provided an extensive background to the relationship between itself and Air Mauritius Ltd. It has notably been averred that a new Collective Agreement was signed on 16 July 2020 for a duration of four years with the terms and conditions contained therein coming from the Administrators themselves. A Procedure Agreement was also signed. Shortly thereafter, individual letters of offer were sent to a limited number of its members on 5 August 2020 giving two days to respond. Those who received same accepted blindly in order to secure their employment. The letter *inter alia* mentioned that it reflected the terms of the agreement made with the union. The Appellant contends that some clauses of this letter are abusive and illegal. The Administrators have purported to deprive the Appellant's members of their acquired rights under the new Collective Agreement, notably with regard to the imposition of 18 months leave without pay ("LWP") to all pilots over a three-year period.

It has further been averred that the Appellant, in an amicable manner, tried to mitigate the damage caused to its members by requesting that the offending terms be reviewed by the Administrators, but to no avail. In a meeting with the Administrators on 23 September 2020, they were informed that LWP would be applicable across the board as from 1 October 2020. LWP was never discussed with the unions at the time of the signing of the new Collective Agreement. This has left the pilots with about 30% of their previous annual remuneration. Not all members are being treated equally and in the same manner.

Several correspondences were sent to the Administrators to object the LWP scheme as no meaningful negotiations were entered into. The latter has shown no will to address the objections. The matter was referred to the Conciliation and Mediation Section of the Ministry of Labour. In October 2020, there were several unilateral changes impacting terms and conditions of employment without any prior consultation with the union. Two meetings were held at the Ministry of Labour between union and management representatives, but no agreement was reached and therefore a deadlock was reached. A labour dispute was reported to the CCM, which was rejected by its President by way of letter dated 7 December 2020. This letter is ambivalent and does not set out clearly the reasons for which the application was set aside under *section 65* of the *Act* save for quotes of the law. The decision to reject the application is erroneous in law and in breach of the Applicant's right to be heard.

The Appellant notably avers that there were meaningful negotiations with the employer before and afterwards at two sessions at the Conciliation and Mediation Section of the Ministry of Labour. The President of the CCM failed to state which procedures have not been complied with under the *Act* and/or the Procedure Agreement. Reference to *section 67 (2)* of the *Act* is also erroneous as it fails to identify precisely the issues which fall foul of these provisions. The Appellant's case is that it was bullied into forgoing two previous Collective Agreements to enter into a new one in July 2020; and the employer has decided to issue individual contracts in contradiction with the terms of the new Collective Agreement. It was incumbent on the CCM to hear it out given the facts elicited in their application and the documents produced. The decision to reject their application must be revoked in line with *section 66 (2)* of the *Act*.

THE RESPONDENT'S STATEMENT OF REPLY

The Respondent, on the other hand, has in its Statement of Reply notably averred that the Appellant has brought new elements in its Statement of Case, which did not form part of the report of labour dispute reported to the Respondent. It has notably been averred that on 2 December 2020, the Appellant reported a labour dispute to the Respondent against Air Mauritius Ltd (Administrator Appointed) on the abovementioned terms; the Appellant has failed to produce and/or adduce evidence before the Respondent to substantiate that meaningful negotiations have taken place and a stage of deadlock has been reached; procedures under *section 64 (2)(a)* of the *Act* have not been complied with; a Collective

Agreement was signed on 16 July 2020 and is still in force and binding between the parties; the dispute was rejected by the Respondent by letter dated 7 December 2020. It has further been averred that the letter dated 7 December 2020 fully complies with the requirements of the law and constitutes proper notice to the Appellant of rejection of the labour dispute under *section 65 (3) of the Act*.

THE EVIDENCE OF WITNESSES

Mr Mariahven Caremben, Advisor in Industrial Relations and Policy Matters at the Ministry of Labour, Human Resource Development and Training, deposed on behalf of the Appellant Union. He confirmed that following a complaint by MALPA to the Ministry, there were meetings held at the Conciliation and Mediation Section. It was agreed in the first meeting that the parties would meet to see eye-to-eye regarding the issues in dispute. In the second meeting, the issue of a new contract submitted to pilots putting them on a part-time basis and on leave without pay was raised. The union did not agree to the signing of the new contract and the delay of two days given. Mr Caremben related that Counsel for MALPA stated that this a point which cannot be settled and should be referred to the CCM to be trashed out. At that stage, it appeared that there was a deadlock between the parties on the issue.

Mr Rakesh Ramkurrun, Senior Labour and Industrial Relations Officer at the CCM, adduced evidence on behalf of the Respondent. He notably swore as to the accuracy of the Labour Dispute Form at Annex A of the Respondent's Statement of Reply. He thereafter produced the aforesaid form together with annexes attached thereto (Document A). This set of documents represent the totality of the documents before the CCM when the decision to reject was taken.

Upon questions from Counsel for the Appellants, the witness notably stated that *section 65 (1)(d) of the Act* is the empowering section giving the Respondent the power to reject a report. There is a Procedure Agreement signed with MAPLA on 1 July 2020. The President is referring to procedures under the *Act*. He agreed that the Respondent was referring to, *inter alia, section 64 (2)(a)(ii) & (iii) of the Act*. There has been no evidence produced that a deadlock was reached between the parties. He agreed that there were no reasons assigned to the Respondent's decision.

THE SUBMISSIONS OF COUNSEL

Learned Senior Counsel for the Appellants notably submitted that the Respondent holds the power to reject a labour dispute under *section 65* of the *Act* under certain conditions. Under *section 65 (1)(d)* of the *Act*, he decided to reject on the basis that the Appellants have failed to comply with dispute procedures specified in the *Act*. Any statutory power must be used judiciously and the statutory body has to make a decision within the realm of its powers, but these must be accounted for and reasoned. The President of the CCM has in effect stated that he has the power under *section 65 (1)(d)* and is exercising same by reason of *sections 64 (2)(a)(ii) & (iii)* and *67 (2)* of the *Act*.

Senior Counsel moreover submitted that the Labour Dispute Form has been made for any citizen of the country coming to the CCM. Regarding the words '*deadlock*' and '*meaningful negotiations*', there is no threshold test which says that these particular words have to be used. There were several correspondences sent to express the union's views and objections towards the employer's decision followed by two meetings at the Ministry of Labour. These were enough to suggest that, at that moment in time, there had been negotiations. This was confirmed by Mr Caremben, who sent the parties to the drawing board to find a solution; to which they came back and informed that they were not coming to terms. That can only mean that there was a deadlock. If the Respondent had afforded the Appellants the opportunity to come and give evidence instead of throwing them out without a hearing, then he would have been in a better place to make a decision. This is a breach of natural justice, a failure to comply with the *audi alteram partem* rule. These submissions were in relation to the first part of the Respondent's reasoning.

On the second part of the President of the CCM's reasoning, Learned Senior Counsel submitted that this refers to *section 67 (2)* of the *Act*. We are left in the dark at the failure of the Respondent to specifically state whether it is (a), (b) or (c). How would one know on the basis of a decision that has no reasoning behind it? The President, when acting on *section 65 (1)*, acts on *prima facie* evidence of what is placed before him. If rules of natural justice were to apply, then there is a likelihood that some evidence needs to be adduced for the CCM to make a decision. The Respondent in its Statement of Reply stated that the Appellant failed to produce

and/or adduce evidence before the Respondent; this is *non sequitur*. If no right is given to adduce evidence, how can same be adduced? Same cannot be adduced by virtue of the application made to the CCM. Although there was a Collective Agreement, it is not in itself a bar to a case before the CCM. The reference made to *section 65 (1)(d)* of the *Act* was ambivalent as it caters for two possibilities.

Learned State Counsel for the Respondent, on the other hand, relied on the cases of *Hotels and Restaurants Employees Union and The President of the CCM (ERT/RN 133/17)* and *Port Louis Maritime Employees Association and The President of the CCM (ERT/RN 151/2018)* in support of his submissions that the Tribunal cannot take into account matters not brought to the Respondent's attention when a dispute is reported to him. The evidence of Mr Caremben, in the present matter, cannot be taken into account for determining this appeal. The Labour Dispute Form does not mention the employer's stand and whether negotiations were engaged into or not. Whether there were meaningful negotiations or a deadlock following the meeting was not before the Respondent. The MALPA has not stated what was the outcome of the meetings. It was the union's duty, if not to bring this evidence, but to at least state that there have been meaningful negotiations and a deadlock.

State Counsel further submitted, under *section 65 (1)(d)* of the *Act*, that irrespective of whether reliance has been placed on the Procedure Agreement or under procedures not followed under the *Act*, both have not been followed inasmuch as there has been no demonstration of meaningful negotiations and no demonstration of a deadlock.

Senior Counsel for the Appellant, in reply, notably stated that the Respondent had the power to require the Appellants to furnish particulars under *paragraph 20 (3)* of the *Second Schedule* to the *Act*, although it is not an absolute duty. Senior Counsel moreover did not dispute that there is no legal obligation on the Respondent to hold a meeting with a disputant.

THE MERITS OF THE APPEAL

In the present matter, the Disputant reported a labour dispute on 2 December 2020 to the CCM against Air Mauritius (Administrator Appointed) Ltd on terms as previously noted. The

Labour Dispute Form (Document A) evidencing the report of the dispute between the parties was produced by the Respondent before the Tribunal complete with its various annexes. On 7 December 2020, the President of the CCM had informed the Appellant Union, by letter, that the report of the dispute was rejected.

It would be useful to reproduce the salient aspects of the letter of the President of the CCM (*vide* Annex 15 to the Appellant's Statement of Case), 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 read as follows:*

...

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

The Appellant Union submitted a Statement of Case before the Tribunal whereby it has set out reasons under which it is appealing the Respondent's decision *in lite*. It would be proper to consider the averments of the following paragraphs pertaining to the present appeal:

62. *The Applicant avers that a **Labour Dispute Application** was therefore lodged at the Commission for Conciliation and Mediation. A copy of the application is herewith enclosed and marked Annex 14.*

64. *The Applicant avers that the Application reference CCM/DIS/174/20 was rejected by the CCM by letter dated 07 December 2020 (Annex 15).*

65. *The Applicant considers that the aforementioned letter – Annex 15 – is ambivalent and does not set out clearly the reason(s) for which the application has been set aside under s.65 of the ERA save for the quotes of the law. The Applicant therefore considers the decision to reject their application as being erroneous in law and in breach of their right to be heard.*

67. *In any case the Appellant avers that:*
- (A) *the reference to s.64(2)(a)(ii)(iii) of the ERA is erroneous in as much as there were **meaningful negotiations** with the employer before and afterwards at two sessions at the Conciliation and Mediation Section of the Ministry of Labour's Office where a **deadlock** was reached;*
 - (B) *the reference to s.65(1)(d) is **ambivalent** as the President of the CCM fails to state which procedures have allegedly not been complied with under the ERA or/and the Procedure Agreement;*
 - (C) *the reference to s.67(2) of the Act is equally erroneous in as much as it fails to identify precisely the issues which allegedly fall foul of these provisions.*
68. *The Applicant's case is simple enough: it has been bullied into foregoing two CBA and enter into a new one in July 2020 and the employer has now decided to issue individual contracts which are in contradiction with the terms of the collective agreement of 2020.*
69. *The applicant avers that it was incumbent upon the CCM to hear it out given the facts elicited in their application and the documents produced.*

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.'

The Respondent's letter dated 7 December 2020 does not substantiate why the labour dispute has been rejected under this ground, save for literally quoting the aforementioned subsection verbatim. It should be noted 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)*). There is no doubt that the Appellant has been left in the dark as to what limb of *section 67 (2)* the Respondent is relying upon to reject the report of the labour dispute in the absence of any clarifications, explanations or reasoning as to the specific limb being invoked.

The Appellant Union cannot be said to be in a situation of clarity nor certainty regarding which aspect of *section 67 (2)* of the *Act* is being invoked against it by the Respondent. The Tribunal can only find that this ground of rejection has not been 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 report 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 particular provision 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 to the CCM on 2 December 2020 reveals that the Appellants stated the following in relation to the heading ‘*Explain what has been done to try to solve the dispute*’ at part 6 of the form:

Several correspondence were sent to express the Union views and objection towards the decisions of the MK under Voluntary Administration.

Followed by two meetings at the Conciliation and Mediation Section at the Ministry of Labour.

Among the various annexes to the Labour Dispute Form are the Collective Agreement 2020; the Procedure Agreement 2020; an email dated 9 September 2020 from MALPA bearing subject matter '*Complaint against MK management*' addressed to laliphon@govmu.org and copied to *inter alia* the Chief Executive Officer of Air Mauritius Ltd and one of the appointed Administrators; and an email dated 22 July 2020 bearing subject matter '*CAP unilateral changes*' sent to Mr Alexandre Marot on 27 November 2020. It may also be noted that the Procedure Agreement 2020, signed on 16 July 2020, notably provides for procedures for treating individual grievances/disputes (*vide* Article 12 thereof) and contains provisions on how to cater for collective disputes (*vide* Articles 13 and 14 thereof).

It is clear from the Labour Dispute Form that there has been no mention made of the words '*meaningful negotiations*' or '*deadlock*'. Although two meetings at the Ministry of Labour were mentioned, as per the attributed meaning of '*meaningful negotiations*' under the *Act*, it cannot be ascertained from what has been stated in part 6 of the form whether these meetings were with a view to finding mutually acceptable solutions. Moreover, nowhere has the Appellant mentioned that a deadlock was reached following these meetings or used any other words to the same effect.

The Appellant Union has, before the Tribunal, sought to substantiate the two meetings held at the Conciliation and Mediation Section through the evidence of Mr Caremben. The latter, who presided the two meetings, clearly stated that the parties would meet to see eye-to-eye on the issues in dispute and that it appeared that a deadlock was reached in the second meeting. However, there is nothing on record to suggest that the substance of Mr Caremben's evidence was brought to the Respondent's attention at the time of the reporting of the dispute.

The Respondent cannot act on evidence or averments that have not been made in the Labour Dispute Form. In the present matter, it is clear that there is no averment or evidence produced from the Appellant Union as to '*meaningful negotiations*' or of a '*deadlock*' as required under *section 64 (2)(a)* of the *Act*. Thus, the evidence of Mr Caremben, not being before the Respondent at the time of the reporting of the dispute, cannot be validly considered by the Tribunal for the purpose of the present appeal.

Learned Senior Counsel for the Appellant has contended that natural justice required that the President of the CCM hold a meeting with the Appellant Union prior to deciding on whether to reject the report of the dispute. Same is permitted under *paragraph 20 (3)* of the *Second Schedule* to the *Act*. Although under *section 97* of the *Act*, the CCM may have regard to the principles of natural justice in exercising its functions under the *Act*, there is no absolute duty to do so and is a matter of discretion.

Whether the President of the CCM should have held a meeting with the Appellant Union prior to rejecting the dispute would therefore be at his discretion. The Respondent, in exercising his functions as head of a statutory body, is bound to act judiciously and not arbitrarily. It cannot also be overlooked that, under *section 69 (1)* of the *Act*, the Respondent may proceed with the conciliation and mediation process of promoting the settlement of a dispute where the dispute has not been rejected or the rejection of the dispute has been revoked on appeal.

Although it has been found that there was no evidence of '*meaningful negotiations*' nor of a '*deadlock*' as is required under *section 64 (2)(a)* of the *Act*, invoking this particular section on its own is not sufficient to reject the report of a labour dispute under the *Act*. *Section 64* per se does not confer any power on the President of the CCM to reject the report of a dispute and *subsection (2)(a)* thereof only provides circumstances under which a dispute cannot be reported to the CCM.

The Respondent's power to reject the report of a labour dispute stems from *section 65* of the *Act*. This particular section empowers the President of the CCM to reject the report of a labour dispute under *section 64* where he is of the opinion that circumstances listed at *section 65 (1) (a) to (f)* are present. If the Respondent did find that *section 64 (2)(a)(ii) & (iii)* was not followed in the matter, he should have lawfully rejected the report of the dispute under *section 65 (1)(d)* of the *Act* inasmuch as the Appellants could have been found to have failed to comply with dispute procedures specified in the *Act*, particularly under *section 64 (2) (a)(ii) & (iii)* of same.

However, from a perusal of the letter dated 7 December 2020, the rejection under *section 64 (2)(a)(ii) & (iii)* is not coupled with *section 65 (1)(d)* of the Act nor can these two sections be construed to be read together as set in the letter. As can be noted from the reproduction of the letter above, the rejection under *section 64 (2)(a)(ii) & (iii)* is separate from the rejection under *section 65 (1)(d)* of the Act.

The Tribunal thus cannot be satisfied that the Respondent has validly rejected the report of the Appellant's dispute under *section 64 (2)(a)(ii) & (iii)* of the Act on its own as *section 64 (2)* does not empower him to reject the report of a dispute. The Tribunal therefore revokes the decision of the President of the CCM to reject the report of the labour dispute under *section 64 (2)(a)(ii) & (iii)* of the Act.

The President of the CCM has also relied on *section 65 (1)(d)* of the Act in rejecting the report of the Appellant Union'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.

As a matter of construction, it is apposite to note that 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*'. The two given circumstances are therefore deemed to be disjunctive and cannot implied to be similar (*vide section 5 (5)* of the *Interpretation and General Clauses Act*).

In the present matter, the Respondent's letter dated 7 December 2020 does not give any indication as to which circumstance the President is relying upon to reject the report of the Appellant's labour dispute. This would be important to know for the sake of clarity and certainty inasmuch as the Appellant Union could have relied on both the procedures under the Act and those provided for under a Procedure Agreement in eventually reporting its dispute at the level of the CCM. As previously noted, the Procedure Agreement 2020 annexed to the Labour Dispute Form does make provision for the resolution of individual and collective disputes.

In the absence of reasons from the Respondent in his letter dated 7 December 2020, no light is shed as to what circumstance is being invoked under *section 65 (1)(d)* to reject the report of the dispute. Despite the Respondent's representative's evidence before the Tribunal to the effect that the President of the CCM was referring to procedures under the *Act*, this is not at all apparent from the terminology used in the letter rejecting the report of the dispute. It may also be noted this particular evidence contradicts the submission of Respondent's Counsel to the effect that both procedures under the *Act* and those in the Procedure Agreement have not been followed by the Appellant.

Although *section 65 (1)* of the *Act* does not impose any duty on the Respondent to give reasons when rejecting the report of a dispute, doing so would only enhance the decision making process of the CCM and be of benefit to all concerned. It should be noted 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)*).

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.

Although, as previously noted, there is no legal duty to provide reasons, in invoking *section 65 (1)(d)* of the *Act* to reject the report of the dispute, the Respondent has failed to properly inform the Appellant Union which procedures have not been followed under this particular *sub-paragraph*. In view of this uncertainty, the Tribunal cannot be satisfied that the Respondent has validly rejected the report of the dispute made to it on 2 December 2020 under *section 65 (1)(d)* of the *Act*. The Tribunal therefore revokes the decision of the President of the CCM to reject the dispute under *section 65 (1)(d)* of the *Act*.

The Tribunal, after having heard the appeal and having duly considered the decision of the Respondent in relation to each of the sections put forward in the letter dated 7 December

2020, therefore revokes the decision of the President of the CCM to reject the report of the Appellant's dispute in the present matter.

The appeal is therefore upheld.

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SD Shameer Janhangeer
(Vice-President)

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SD Vijay Kumar Mohit
(Member)

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SD Rabin Gungoo
(Member)

.....
SD Parmeshwar Burosee
(Member)

Date: 5th March 2021

