

**EMPLOYMENT RELATIONS TRIBUNAL**

**RULING**

**ERT/ RN 184/20**

**Before**

<b>Indiren Sivaramen</b>	<b>Acting President</b>
<b>Raffick Hossenbaccus</b>	<b>Member</b>
<b>Karen K. Veerapen</b>	<b>Member</b>
<b>Ghianeswar Gokhool</b>	<b>Member</b>

**In the matter of:-**

**Mauritius Freeport Development Co. Ltd (Disputant)**

**And**

**Private Sector Employees Union (Respondent)**

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation (“the CCM”) under Section 69(9)(b) of the Employment Relations Act, as amended (hereinafter referred to as “the Act”). The Disputant and Respondent were assisted by Counsel. The terms of reference of the point in dispute read as follows:

*“Whether the existing wages, terms and conditions of employment of employees of Mauritius Freeport Development Co. Ltd (MFD) contained in the Collective Agreement signed between MFD and Port Louis Maritime Employees Association (PLMEA) on 30 May 2017 be extended for a minimum period of three years from the date of the award of the Tribunal, as the demands of the Private Sector Employees Union to review the latter Collective Agreement are estimated at around Rs 200 Millions in 2020 and Rs 100 Millions per year as from 2021- costs that are unreasonable, unacceptable and unsustainable, the more so, that the economic climate prevailing in Mauritius due to the unprecedented COVID-19 pandemic provides no visibility on the foreseeable future”.*

The Respondent has taken preliminary objections to the Disputant’s Statement of Case which read as follows:

## **Objection to the Disputant's Statement of Case**

1. *The Terms of Reference under which the present dispute has been referred to the Tribunal by the Commission for Conciliation and Mediation ("CCM") read as follows:*

*"Whether the existing wages, terms and conditions of employment of employees of Mauritius Freeport Development Co. Ltd (MFD) contained in the Collective Agreement signed between MFD and Port Louis Maritime Employees Association (PLMEA) on 30 May 2017 be extended for a minimum period of three years from the date of the award of the Tribunal, as the demands of the Private Sector Employees Union to review the latter Collective Agreement are estimated at around Rs 200 Millions in 2020 and Rs 100 Millions per year as from 2021 –costs that are unreasonable, unacceptable and unsustainable, the more so, that the economic climate prevailing in Mauritius due to the unprecedented COVID-19 pandemic provides no visibility on the foreseeable future".*

2. *A material element of the said terms of reference is the impact of the Covid-19 pandemic upon the business and affairs of the Disputant.*
3. *The demands of the Respondent which are referred to in the Terms of Reference are those contained in a letter dated 25<sup>th</sup> November 2019 addressed by the Respondent to the Disputant (the "Demands"- **Annex B to the Disputant's Statement of Case ("SOC")**)*
4. *The above-mentioned Demands were made by the Respondent prior to the onset of the Covid-19 pandemic and same was reported as a Labour Dispute by the Disputant prior to Covid-19 pandemic.*
5. *A substantially altered version of the initial Labour Dispute was referred to the Tribunal.*
6. *The Respondent is no longer insisting upon the Demands. During informal negotiations held between February 2021 and September 2021, the Respondent has communicated to the Disputant that they are no longer insisting on the initial demands and communicated to the Disputant a list of new demands (the "New Demands"), which are hereto annexed as [**Annex 1**].*
7. *The Respondent communicated a new proposal on salaries and other condition of works, which are hereto annexed as [**Annex 2A & Annex 2B**]*

8. *The New Demands of the Respondent take into consideration the Covid -19 pandemic and would not have a retroactive financial impact of Rs. 200 million for the year 2020 upon the Disputant, nor of Rs. 100 million for the year 2021.*
9. *Given the New Demands, the dispute of the Disputant as set out in its Statement of Case has become “caduc” and has no further “raison d’être”. Any order by the Tribunal to extend the Collective Agreement dated 30<sup>th</sup> May 2017 would find no basis in fact or in law. The Respondent hence prays that the Tribunal should not make any award as per paragraph 14 of the SOC.*
10. *The Respondent avers further that since 30<sup>th</sup> May 2017, there have been major alterations to employment legislation in Mauritius (October 2019), such that this Tribunal cannot therefore order that the terms and conditions of the 2017 Collective Agreement should be extended without any modifications which would take into consideration the said new legislation.*
11. *In parallel, the Respondent avers that several existing conditions of employment have been altered after year 2017 by the Disputant itself and this Tribunal cannot therefore order as prayed for by the Disputant, to the risk of causing prejudices to employees represented by the Respondent.*
12. *The question of extension of the 2017 Collective Agreement was in fact never raised in any meetings between parties, nor before the CCM prior to the dispute being referred to this Tribunal, when the employer annexed this document as **[Annex A of Disputant Statement of Case]**. The Tribunal cannot Order an extension of a Collective Agreement which has never been the subject of any Dispute.*
13. *In the alternative, the Respondent prays for an Order from the Tribunal that the New Demands, being reasonable and acceptable, should take effect as terms and conditions of employment at the Disputant as from 1<sup>st</sup> January 2020.*

Ex facie the annexes to the Statement in Reply and paragraph 6 (above), it would appear that paragraph 7 (above) should have referred to the Disputant instead of the Respondent.

The Tribunal has heard arguments from Counsel on either side. The gist of the arguments for Senior Counsel appearing for Disputant is that once the CCM has referred the dispute to the Tribunal, the latter shall enquire into the matter and make an award thereon. Senior Counsel also argued that it was within the province and powers of the CCM to decide

how to bring and refer this matter to the Tribunal. Reference was made to section 69(10) of the Act to support this argument.

Counsel for Respondent on the other hand argued that the dispute which was referred to the Tribunal had been substantially altered when compared to the dispute which had been reported to the President of the CCM. He referred to the Covid-19 issue and stated that this did not form part of the terms of reference before the CCM so that there could not have been a deadlock between the parties in relation to same. Counsel also stressed on the terms of reference of the dispute which were, according to him, extremely specific and that the Tribunal could not go beyond the terms of reference or else it would be exceeding the terms of reference referred for arbitration. Counsel referred to the new demands of the Respondent and suggested that any award of the Tribunal would be academic and not reflect the real demands of the employees. According to counsel, in the light of the undertaking he gave on behalf of Respondent and the terms of reference as worded, there would be no basis for this dispute so that the dispute has become 'caduc'.

The Tribunal has examined all the arguments offered on both sides and the Statement of Case of the Disputant and the Statement in Reply of the Respondent. For the purposes of the objections taken on behalf of the Respondent, the Tribunal has proceeded on the basis that all the averments made in the Statement of Case of the Disputant are deemed to be accepted.

The Tribunal notes that as per the referral, the Disputant reported the present dispute to the President of the Commission for Conciliation and Mediation on 20 February 2020. As per the letter of referral, conciliation meetings were held at the Commission and no settlement has been possible. The referral letter continues as follows: "*The Commission, at the request of the Mauritius Freeport Development Co. Ltd, is referring the labour dispute to the Employment Relations Tribunal for arbitration, in terms of Section 69(9)(b) of the Employment Relations Act 2008 as per enclosed terms of reference.*"

The Tribunal does not sit on appeal against the referral of a labour dispute to the Tribunal as opposed to the right of appeal under section 66 of the Act against a decision of the President of the CCM to reject a report of a labour dispute made under section 64 of the Act. However, as per the Act, only a labour dispute as defined under section 2 of the Act can be referred to the Tribunal and the Tribunal will have no jurisdiction to hear a dispute which is not a labour dispute. The Tribunal agrees that referral of a dispute to the Tribunal is within the province of the CCM which has the duty to ensure that the dispute has been properly referred to the Tribunal (vide **Mr Purusram Greedharee And (1)Mauritius Ports Authority & (2)Cargo Handling Corporation, ERT/RN 258/11; Mrs Banumattee Rungee and the Municipal Council of Quatre Bornes, ERT/RN 64/10; L. Saleegram and New Educational College, i.p.o. Private Secondary School Authority, ERT/RN**

**22/10).** Section 69(10) of the Act reads as follows: “*The request made by a party to refer a labour dispute to the Tribunal shall be made in such manner as the Commission may approve.*” This provision refers specifically to the “request made by a party to refer a labour dispute to the Tribunal” and does not relate to the terms of reference of the dispute or the dispute itself. As per this section, the CCM is free to decide on the form in which such a request may be made, that is, whether by fax, email, on a prescribed form and so on.

In this particular case, there are certain issues which deserve consideration by the Tribunal. The Tribunal will first refer to the International Labour Organization (ILO) Collective Bargaining Convention, 1981 (No. 154) of which Mauritius is a signatory. Section 2(e) of Article 5 of the Convention reads as follows:

- *1. Measures adapted to national conditions shall be taken to promote collective bargaining.*
- *2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:*
  - *(a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;*
  - *....*
  - *(e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.*

In the present matter, the Tribunal finds nothing wrong with a dispute being reported by an employer and this is catered for under section 64(1) of the Act. The dispute was reported on 20 February 2020 and the Tribunal can take notice that this was before the first Curfew Order which was made under relevant regulations in relation to the Covid-19 pandemic in Mauritius (though the Tribunal also takes notice that the Covid-19 was imported from other regions of the world into the country). There is unchallenged evidence that the dispute reported to the Commission for Conciliation and Mediation was different (as per Doc A) and read as follows:

*“Whether the demands of the Private Sector Employees Union with an estimated cost to the company of around Rs 200 Million in 2020 and Rs 100 Million per year as from the year 2021 are reasonable and acceptable, when the company finds it not sustainable.”*

There are marked differences between the dispute reported to the President of the CCM and the present dispute before us. The main differences are (1) the dispute reported to the President of the CCM related to the demands of the union (underlining is ours) and whether these were reasonable and acceptable whilst the dispute which was ultimately referred to the Tribunal was indeed amended substantially so that now the dispute incorporates essentially a 'demand' of the employer as to whether the existing wages, terms and conditions of employment of employees of Respondent contained in a collective agreement signed between Disputant and another trade union on 30 May 2017 should be extended for a minimum period of three years as from the date of the award of the Tribunal (underlining is ours); and (2) the initial dispute reported to the President of the CCM did not refer at all to the COVID-19 pandemic whilst the terms of reference of the dispute referred to the Tribunal lay much emphasis on the economic climate prevailing in Mauritius due to the unprecedented COVID-19 pandemic (underlining is ours). Moreover, these substantial differences represent, on a careful reading of the terms of reference, essential elements of the dispute which the Tribunal is being called upon to enquire. Irrespective of the version of the Respondent, there is no single averment in the Statement of Case of Disputant that the extension of the wages and terms and conditions of employment contained in the 2017 Collective Agreement has been discussed meaningfully between the parties. Until now, the Tribunal is at a loss to understand how the extension sought of the existing wages and terms and conditions of employment contained in the 2017 Collective Agreement and more especially for a minimum period of three years from the date of the award of the Tribunal (underlining is ours) found its way in the terms of reference of the dispute. As per Doc A (produced on behalf of Disputant), in the report of the dispute before the CCM, to a question as to whether the Organisation (meaning the Disputant) has signed any Collective Agreement, the answer ticked was "No".

Counsel for Respondent has drawn the attention of the Tribunal that ex facie Doc A, the Collective Agreement signed on 30 May 2017 was not even annexed as a document in support of the case of the Disputant before the CCM. The Tribunal will not venture to say more on this. However, the Respondent has decided to amend his claims so that the earlier demands of the Respondent are not issues to be thrashed out before the Tribunal and are no longer *d'actualité*. The parties should thus ideally engage in collective bargaining as contemplated by the ILO Collective Bargaining Convention, 1981 (No. 154), the Act and the Code of Practice (more specially sections 112 to 118) instead of the Tribunal being asked to enquire into the matter when very importantly, one party (the Respondent) has undertook to engage in collective bargaining based on the revised claims made.

The coming into operation of a crucial piece of legislation, the Workers' Rights Act, with effect from 24 October 2019 (by way of Act No. 20 of 2019) and the consequential repeal

of the Employment Rights Act will, as rightly conceded by Senior Counsel for Disputant, affect the 2017 Collective Agreement. Amendments will certainly have to be brought to the 2017 Collective Agreement to cater for the changes brought by the Workers' Rights Act. It is thus clear that the "*existing wages, terms and conditions of employment of employees of Mauritius Freeport Development Co. Ltd contained in the Collective Agreement signed between MFD (Disputant) and Port Louis Maritime Employees Association (PLMEA) on 30 May 2017*" cannot simply be extended for a minimum period of three years as from the date of the award of the Tribunal as per the terms of reference.

Also, the reasons given in the terms of reference of the dispute itself for the request as to whether the existing wages, terms and conditions of employment of employees of Respondent contained in the 2017 Collective Agreement be extended for a minimum of three years as from the date of the award of the Tribunal are no longer "d'actualité". Thus even if the Tribunal were to award that the existing wages, terms and conditions of employment of the said employees were to be extended (which cannot be the case, as agreed, following the coming into force of the Workers' Rights Act in 2019), this could not be for the reasons which are given in the terms of reference of the dispute and which were based on initial demands which are no longer being insisted upon.

The Tribunal has examined carefully the arguments of both counsel, the manner in which the dispute has been referred to the Tribunal, the fundamental principle of promotion of collective bargaining and considered the powers granted to it by the legislator. The Tribunal will first of all refer to the Statement of Case of the Disputant which reads as follows:

*Statement of Case of the Disputant*

- 1. The Respondent is a recognised trade union with sole negotiating rights for manual workers and operative staff employed by the Disputant.*
- 2. There is a Collective Agreement in place since the 30<sup>th</sup> of May 2017. The Collective Agreement is annexed and marked as "Document A".*
- 3. On the 25<sup>th</sup> of November 2019, the Respondent gave notice to the Disputant under section 53 of the Employment Relations Act, in order to initiate negotiations in view of reaching a new collective agreement on terms and conditions of service of workers in the bargaining unit. The Respondent annexed a list of issues in order to upgrade the terms and conditions of service of concerned employees. A copy of the letter dated the 25<sup>th</sup> of November 2019 together with the list of issues is annexed and marked as "Document B".*

4. *On the 28<sup>th</sup> of January 2020, a first negotiation meeting was held with the Respondent. During the course of the meeting, the Respondent adopted a prescribing tone and they directed the Disputant to only come forward with propositions that are near their demands. The Respondent also stated that the Disputant should not do a “mise en scène de négociation”. A copy of the minutes of the meeting is annexed and marked as “Document C”.*
5. *On the 20<sup>th</sup> of February 2020, the Disputant reported a Labour Dispute to the Commission for Conciliation and Mediation (hereinafter referred to as “the CCM”).*
6. *The facts of the Dispute related to the prescribing tone adopted by the Respondent during the first negotiation meeting of the 28<sup>th</sup> of January 2020 where they were directing the Disputant to only come forward with propositions that are near their demands.*
7. *The Labour dispute relates wholly and mainly to wages and to terms and conditions of employment. The demands of the Respondent for new terms and conditions for manual workers and operating staff as per the list of issues in Document B with an estimated cost of around Rs 200 M in 2020 and Rs 100 M per year as from the year 2021, are unreasonable and unacceptable.*
8. *Several conciliation meetings were held at the CCM. The Disputant’s stand was that negotiations were to be held under the aegis of the CCM given the unreasonable and unsustainable demands of the Respondent, its prescribing tone that the Disputant must only come forward with propositions that are near its demands and its statement that the Disputant should not do a “mise en scène de négociation”. Page 2 of the meeting of the 28<sup>th</sup> of January 2020. The Disputant’s stand to negotiate under the aegis of the CCM was so that the CCM could act as facilitator to ease the negotiations and to preserve good industrial relations.*
9. *However, the Respondent refused to negotiate under the aegis of the CCM.*
10. *On the 25<sup>th</sup> of November 2020, the CCM declared that a stage of deadlock had been reached. A copy of the letter dated the 25<sup>th</sup> of November 2020 is annexed and marked as “Document D”.*
11. *On the 7<sup>th</sup> of December 2020, the CCM referred the Labour Dispute to the Employment Relations Tribunal for arbitration in terms of section 69(9)(b) of the Employment Relations Act. The terms of reference reads as follows:- “Whether the existing wages, terms and conditions of employment of employees of Mauritius*



*Freeport Development Co. Ltd (MFD) contained in the Collective Agreement signed between MFD and Port Louis Maritime Employees Association (PLMEA) on 30 May 2017 be extended for a minimum period of three years from the date of the award of the Tribunal, as the demands of the Private Sector Employees Union to review the latter Collective Agreement are estimated at around Rs 200 Millions in 2020 and Rs 100 Millions per year as from 2021 - costs that are unreasonable, unacceptable and unsustainable, the more so, that the economic climate prevailing in Mauritius due to the unprecedented COVID-19 pandemic provides no visibility on the foreseeable future". A copy of the letter dated the 7<sup>th</sup> of December 2020 is annexed and marked as "Document E".*

*12. The Disputant cannot entertain the demands of the Respondent for terms and conditions of employment as per Document B for the reasons that:*

- a) The Disputant in the Collective Agreement of the 30<sup>th</sup> of May 2017 (Document A), granted inter alia to all employees, an increase of 25% in 2017 and an additional of 3% in 2019. Any increase relating to wages, terms and conditions of employment becomes a fixed cost to the Disputant and this amount must be paid every year. The cost to the Disputant of the Collective Agreement of the 30<sup>th</sup> of May 2017 was around Rs 28M for the year 2017, Rs 30M for the year 2018, Rs 34M for the year 2019 and Rs 35M for the year 2020 based on the headcount of 2016 and excluding government increases.*
- b) The Total Comprehensive Income for the year 2019 as per the audited accounts of the Disputant amounts to Rs 60.9M. The Unaudited accounts of the Disputant for the nine months ended 30 September 2020 shows a Total Comprehensive Income of Rs. 27.1M which is 34% lower than for the same period in 2019 (Rs. 40.9M). The above figures show that, should the request of the PSEU be accepted, the Disputant will start making losses. This will be unsustainable and will endanger the ability of the Disputant to continue as a going concern.*
- c) Further it should be noted that the Disputant is indebted at 30 September 2020 to the bank in the sum of Rs 682.0M for loans, Rs 171.4M for bank overdrafts and Rs 149.6M for leasing facilities, thus making a total indebtedness of Rs 1.003 Billion.*
- d) Most of the terms and conditions of employment provided by the Disputant are more favourable than what the law provides for. For example, the Disputant provides for a minimum salary of Rs 12,780 as compared to the national minimum of Rs 10,200 and it pays a meal allowance of Rs. 120 instead of Rs. 85 as prescribed.*

- e) *The reconduction of the existing Collective Agreement signed on 30 May 2017, when applied to the year 2021, will cost the Company Rs 36.1M.*
- f) *The unprecedented COVID-19 Pandemic has brought great uncertainty to the foreseeable future.*

*13. Document annexed and marked as "Document F" details the cost to the Company of the various demands of the PSEU and Document annexed and marked as "Document G" is a comparison between the existing grid of salaries as at 2019 and the new grid proposed by the union.*

*14. For the reasons set out above, the Disputant moves for an Award extending the Collective Agreement with the existing terms and conditions of the 30<sup>th</sup> May 2017 for a minimum period of three years from the date of the award of the tribunal.*

As stated above, for the purposes of this ruling the averments made in the Statement of Case of Disputant are deemed to be accepted. Ex facie the Statement of Case of Disputant, it was the Respondent which gave notice to the Disputant under section 53 of the Act in order to initiate negotiations in view of reaching a new collective agreement on terms and conditions of service of workers in the bargaining unit (paragraph 3). On 28 January 2020, a first negotiation meeting was held with the Respondent and it is averred that the latter adopted a prescribing tone and directed the Disputant to only come forward with propositions that are near their demands (paragraph 4 of the Statement of Case of Disputant). On 20 February 2020, the Disputant reported a Labour Dispute to the Commission for Conciliation and Mediation.

Paragraph 7 of the Statement of Case (above) has to be considered in the light of initial demands of Respondent which are no longer *d'actualité* and new demands which are reflected ex facie the Statement in Reply of Respondent. The version of Respondent is that the Respondent has made New Demands (paragraph 6 of the Statement in Reply). The Respondent is certainly free to make his demands and change his demands and Disputant cannot insist or impose on Respondent that initial demands made must be maintained so that their own 'claim' or 'demand' which stems or relies mostly, if not exclusively, on the initial demands of the Respondent can stand. The situation in which the Disputant finds itself stems from the manner in which the initial dispute which was reported has been amended so that now for the first time we have a dispute which relates essentially to a demand from the Disputant (as opposed to demands or claims from the Respondent) for an extension of the existing wages and terms and conditions of employment of employees of Disputant (as per a collective agreement signed with another union) for a minimum period of three years from the date of the award of the

Tribunal. The Tribunal is being requested to enquire as to whether the 'initial' demands of the Respondent to review the Collective Agreement are estimated at around Rs 200 Millions in 2020 and Rs 100 Millions per year as from 2021 and which costs would be unreasonable, unacceptable and unsustainable whilst as per the own Statement of Case of Disputant this resulted from demands made at a particular time which was before the first ever Curfew Order made in Mauritius in March 2020 in relation to the Covid-19 pandemic. The Statement in Reply of Respondent (see above the part thereof quoted and which deals exclusively with the preliminary objections) refers to new demands made and that Respondent is no longer insisting upon the demands which are referred to in the terms of reference before the Tribunal. The terms of reference of the dispute indicate clearly that the basis of the demand of the Disputant is the demands of the Respondent that are estimated at around Rs 200 Millions in 2020 and Rs 100 Millions per year as from 2021 and which costs are allegedly unreasonable, unacceptable and unsustainable. This is the dispute that has been referred to the Tribunal and this dispute has no *raison d'être* or basis given that the demands mentioned in the terms of reference are no longer there. The Tribunal needs not emphasize that it cannot embark on an academic exercise in relation to old demands which are no longer sought.

Ex facie the pleadings before the Tribunal, whilst for example the new salary scale initially sought by Respondent was to be effective as from 1 January 2020 and salary increase was to be paid in January 2020 payroll (Annex A to Document B to the Statement of Case of Disputant), as per the Statement in Reply of Respondent, increase in increments and salary increase are now sought to be applicable as from January 2021. On several items, the Respondent is now either proposing that the issues be postponed for next collective agreement negotiations or reducing its claims (ex facie Annex 1 to the Statement in Reply of Respondent when compared to Document B to the Statement of Case of Disputant). Document G annexed to the own Statement of Case of Disputant is quite telling in the face of the Statement in Reply of the Respondent. What is more important however is that the terms of reference of the dispute before the Tribunal are based on the initial demands of the Respondent which are no longer the same and which have been revised.

On the issue of the coming into force of the Workers' Rights Act with effect from 24 October 2019, which repealed the Employment Rights Act, it is not challenged on behalf of Disputant that the Tribunal will in fact not (underlining is ours) be able to simply extend the existing terms and conditions contained in the 2017 Collective Agreement because of the Workers' Rights Act which will necessarily have repercussions on the collective agreement. Besides, we note that the existing 2017 Collective Agreement (ex facie Doc A to the Statement of Case of Disputant) does refer in various provisions to the now repealed Employment Rights Act. It has been argued on behalf of Disputant, that it will be for the Tribunal to come up with necessary amendments, as may be required, in the light of this very important piece of legislation both for workers and employers which is

the Workers' Rights Act. However, as per the terms of reference before it, and very importantly where there is no discretion at all granted to the Tribunal by the use of words such as "or otherwise" (underlining is ours) the Tribunal cannot find otherwise (to the risk of giving an award which would be *ultra vires* the terms of reference – vide **Baccus v Permanent Arbitration Tribunal 1986 MR 272**) than *the existing wages, terms and conditions of employment of employees* of Disputant contained in the said collective agreement should either be extended for a minimum period of three years as from the date of the award or not extended for a minimum period of three years. Disputant is in fact implicitly conceding at this stage itself that the terms and conditions of employment of employees of Disputant as per the 2017 Collective Agreement cannot simply be extended but that amendments will have to be made to cater for the Workers' Rights Act.

Even if the terms of reference provided some discretion to the Tribunal, the Tribunal would then be asked to monopolize the whole procedure and amend and insert whatever provisions it would deem fit should be amended and inserted in the existing terms and conditions of employment in the light of the Workers' Rights Act 2019 (underlining is ours) and which terms and conditions would then apply for a minimum period of three years. This is simply unwarranted and misses the crucial issue that the Tribunal has no jurisdiction in relation to a dispute which relates to any issue within the exclusive jurisdiction of the Industrial Court. Indeed section 71 of the Act provides as follows:

### **71. Exclusion of jurisdiction of Tribunal**

*The Tribunal shall not enquire into any labour dispute where the dispute relates to any issue –*

- (a) within the exclusive jurisdiction of the Industrial Court;*
- (b) which is the subject of pending proceedings before the Commission or any court of law.*

Section 3 of the Industrial Court Act reads as follows:

### **3. Establishment of Industrial Court**

*There shall be an Industrial Court with exclusive civil and criminal jurisdiction to try any matter arising out of the enactments set out in the First Schedule or of any regulations made under those enactments and with such other jurisdiction as may be conferred upon it by any other enactment.* (Underlining is ours)

The Workers' Rights Act is specified in the First Schedule to the Industrial Court Act. This Tribunal would thus not be the appropriate forum to try any matter arising out of the

Workers' Rights Act and should not enquire into a dispute which relates to matters which arise out of the Workers' Rights Act.

Also, allowing such a case to proceed before the Tribunal on the basis of the terms of reference of the dispute (underlining is ours) may be tantamount to the Tribunal itself violating employment laws and fundamental principles of good employment relations. We may here refer for example to section 30 of the Act which provides that no person shall interfere with the functioning of a trade union of workers and this is made an offence by virtue of section 103 of the Act.

The Tribunal has to encourage collective bargaining, be it in favourable economic conditions, and be it in less favourable economic conditions. Bargaining in good faith is a must and every opportunity must be given to parties to indulge in collective bargaining. Collective bargaining carried out in a reasonable and constructive manner between employers and strong representative trade unions, is the best method of conducting employment relations (section 1(c) of the Code of Practice).

A copy of the minutes of the meeting held between Disputant and Respondent (the initial meeting following which a dispute was reported) has been annexed as Doc C to the Statement of Case of Disputant. Ex facie this document, the Tribunal wishes only to highlight the following:

1. Section 113 of the Code of Practice (Fourth Schedule to the Act) provides that bargaining in good faith requires the trade union and the employer to-

...

(e) negotiate in a reasonable, fair and honest manner;

(f) refrain from doing any act that is likely to undermine the bargaining process or the authority of the other party;

(g) provide the other party information that is reasonably necessary to support or substantiate their respective position;

(h) respond and give consideration to proposals made by the other party;

(i) consider the proposals of the other party within a reasonable period and, where the proposal is not accepted, offer an explanation for the non-acceptance;

(j) identify the barriers to agreement and give further consideration to their respective position in the light of any alternative options put forward; (...)

2. Section 116 of the same Code provides that bargaining in good faith does not prevent the parties from expressing their respective opinions.

3. Finally, section 118 of the same Code provides that where a party has reasonable grounds to believe that there has been a breach of good faith during the negotiations, the party shall, wherever practicable, raise the matter at an early stage to enable the other party to remedy the situation.

A trade union may be forceful during collective bargaining whilst at the same time negotiate in a reasonable, fair and honest manner. The parties can no doubt be *assertive* in relation to their respective position and what is proscribed is *aggressive* behaviour.

The Tribunal at this stage wishes to refer to section 6(2)(a) of the Second Schedule to the Act which reads as follows:

*6(2) The Tribunal may in relation to any dispute or other matter before it -*

*(a) remit the matter, subject to such conditions as it may determine, to the parties for further consideration by them with a view to settling or limiting the several issues in dispute;*

In this particular case, bearing in mind the manner in which the dispute has been referred to the Tribunal, the negotiations which are to be conducted between the parties on wages and terms and conditions of employment of employees of Disputant with emphasis, inter alia, on the effect of the Workers' Rights Act, the Covid-19 pandemic on the activities and performance of the Disputant and the revised claims of the Respondent which have to be meaningfully discussed between the parties before any action is contemplated under section 64 of the Act, the Tribunal finds that this is a fit and proper case to remit to the parties for the parties to engage in collective bargaining in good faith. This will at the same time ensure compliance with section 64(2) of the Act in relation to any dispute which may be contemplated.

The Tribunal bears in mind the undertaking given by Counsel appearing for Respondent in the Tribunal on behalf of Respondent and which is as follows:

*Through me Mr Vice-President, the Respondent undertakes to begin negotiations for the signature of a new collective agreement on the basis of the demands which are annexed to its Statement of Reply and will not revert to the original demands which are the subject matter of this case.*

*The Respondent further undertakes to take into consideration the financial statement of the Disputant as at the date of the onset of negotiations, for the period set out and the new demands of the Respondent which are annexed to its Statement of Reply.*

Should there still be no agreement between the parties or any disputes in relation to wages or any of the terms and conditions of employment discussed during collective bargaining, then any party to the dispute, as per section 64(1) of the Act, may report a

dispute to the President of the CCM or both parties may jointly refer the matter to the Tribunal. The parties are however urged to follow strictly the procedures as laid down in the Act and to embark in collective bargaining in good faith and to continue to bargain on other issues even if they have come to a dead-lock on any issue and to conclude an agreement, unless there is a reasonable ground not to do so (section 115 of the Code of Practice).

For all the reasons given above, the matter is remitted to the parties under section 6(2)(a) of the Second Schedule to the Act subject to the conditions mentioned above.

**SD Indiren Sivaramen**

**Acting President**

**SD Raffick Hossenbaccus**

**Member**

**SD Karen K. Veerapen**

**Member**

**SD Ghianeswar Gokhool**

**Member**

**25 April 2022**