

EMPLOYMENT RELATIONS TRIBUNAL

RULING

ERT/ RN 60/21

Before

Indiren Sivaramen	Acting President
Raffick Hossenbaccus	Member
Abdool Feroze Acharauz	Member
Arassen Kallee	Member

In the matter of:-

Mr Nidishwar Ramphul (Disputant)

And

Airports of Mauritius Co Ltd (Respondent)

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation 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 Mr Nidishwar Ramphul should be reinstated in his position of Airport Security Officer having been dismissed on 18 March 2020 without reference to any disciplinary committee, on the charge of gross misconduct.”

A preliminary objection was taken on behalf of Respondent and it reads as follows:

- 1. Ex facie the Disputant’s Statement of Case/Terms of Reference the present application for reinstatement of the Disputant by the Respondent falls outside the jurisdiction of the Employment Relations Tribunal as laid down in S (64)(1A) of the Employment Relations Act, as amended, in as much as the Disputant’s employment was terminated summarily on the ground of gross misconduct and he was paid severance allowance together with one-month remuneration in lieu of notice, in line with the Workers’ Rights Act of 2019.*

2. *The Respondent accordingly moves that the present application be dismissed with cost.*

The Tribunal proceeded to hear arguments from both counsel on the preliminary objection. The Tribunal has examined the arguments offered by both counsel and the Statement of Case of the Disputant and the Statement of Reply for the Respondent. For the purposes of the preliminary objection, the Tribunal will proceed on the basis that all the averments made by the Disputant in his Statement of Case are deemed to be admitted by the Respondent.

The Tribunal will refer to the definition of “labour dispute” under section 2 of the Act:

“labour dispute” –

(a) means a dispute between a worker, a recognised trade union of workers or a joint negotiating panel, and an employer which relates wholly or mainly to –

(i) the wages, terms and conditions of employment of, promotion of, or allocation of work to, a worker or group of workers;

(ii) the reinstatement of a worker, other than a worker who is appointed by, or under delegated powers by, the Judicial and Legal Service Commission, the Public Service Commission or the Local Government Service Commission –

(A) where the worker is suspended from employment, except where the alleged misconduct of the worker is subject to criminal proceedings; or

(B) where the employment of the worker is terminated on the grounds specified in section 64(1A);

(b)

(c) ...

In the present case the dispute is a dispute between a worker (which includes a former worker under the definition of “worker” under the same section 2 of the Act) and an employer which relates wholly or mainly to the reinstatement of the worker. The exceptions contained in paragraph (a)(ii) of the definition (see above) will not apply in the present case since there is nothing on record which suggests that the Disputant is a worker “who is appointed by, or under delegated powers by, the Judicial and Legal Service Commission, the Public Service Commission or the Local Government Service Commission”. However, there is more to it and the dispute must relate wholly or mainly to the reinstatement of a worker where the employment of the worker is terminated on

the grounds specified in section 64(1A) (as per paragraph (a)(ii)(B) of the definition of “labour dispute”). Paragraph (a)(ii)(A) of the definition clearly does not apply here since the employment of Disputant has been terminated and not suspended (as per paragraphs 7 and 8 of the Statement of Case of Disputant and the terms of reference of the dispute).

Section 64(1A) of the Act reads as follows:

64(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 –

- (a) discrimination on the ground of a worker’s race, colour, caste, national extraction, social origin, pregnancy, religion, political opinion, sex, sexual orientation, HIV status, marital status, disability or family responsibilities;*
- (b) a worker being on maternity leave or by reason of the worker’s absence for the purpose of nursing her unweaned child;*
- (c) a worker’s temporary absence from work because of injury sustained at work or sickness duly notified to the employer and certified by a medical practitioner;*
- (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;*
- (e) the worker filing, in good faith, a complaint, or participating in proceedings against an employer involving alleged breach of any terms and conditions of employment; or*
- (f) a worker’s exercise of any of the rights provided for in this Act or other enactment, or in such agreement, or collective agreement or award.*

The jurisdiction of the Tribunal to hear disputes which relate wholly or mainly to reinstatement of a worker has been considered in the case of **Mr Shavindra Dinoo Sunassee And Airports of Mauritius Co Ltd, ERT/RN 97/20**. The Tribunal at page 7 of the award stated the following:

What is then the jurisdiction granted to the Tribunal under the Act for disputes which relate wholly or mainly to reinstatement of a worker? The amendments brought to the Act in 2019 provide an indication as to this jurisdiction. Firstly, to be able to report a dispute in relation to the reinstatement of a worker, the termination of the employment must have been by reason of or because of one of the grounds laid down in section 64(1A) of the Act. The legislator in its wisdom has decided that these grounds carry with them something so wrong, which flouts basic principles of fairness, mutual respect and

fundamental rights of a worker, that termination of employment on any one of such grounds requires an even greater protection for the worker. Termination of employment on any such grounds warrants a speedy, accessible and less formal system of enquiry for the worker whose employment has been terminated, and above all, may lead to an award for reinstatement.

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). (...)

The Tribunal all along in the case of **Mr Shavindra Dinoo Sunassee (see above)** stressed on the need for the reinstatement of the worker to be in relation to termination of employment by reason of one or more of the grounds specified in section 64(1A) of the Act. The Tribunal even referred to these grounds as being “*highly prohibitive grounds for termination of a contract of employment which are laid down at section 64(1A) of the Act*”.

To avoid any possible doubt, the Tribunal rules that it only has jurisdiction to enquire into a labour dispute, that is, in the present matter a dispute which relates wholly or mainly to the reinstatement of a worker where the employment of the worker is terminated by reason of one or more of the grounds laid down in section 64(1A) of the Act. This jurisdiction which is provided by special law (the Act) constitutes an exception to general law. Indeed, the Tribunal in the case of **Mr Shavindra Dinoo Sunassee (see above)** referred to section 3 of the Industrial Court Act which provides 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 First Schedule to the Industrial Court Act refers to the Workers’ Rights Act 2019 which deals lengthily under its Part VI with ‘Termination of Agreement and Reduction of Workforce’.

In the present case, Counsel for Disputant suggested that the dispute would fall under section 64(1A)(f) of the Act. There have been only sporadic averments in the Statement of Case of Disputant which may, if at all, be relevant for the purposes of section 64(1A)(f) of the Act such as that it was as per regulations that the Disputant stopped a passenger from carrying a liquid container in his cabin luggage or the averment that the two passengers involved in the incident threatened to end his career. It has also been averred that Disputant was required to apologize to the two passengers but his

apologies were not accepted. Mention is made of a report which Disputant was requested to write following the incident and this report is not before the Tribunal. Also, it has been averred that the Disputant never accepted any compensation and that the transfers made to his bank account were made unilaterally.

The Tribunal finds that at this stage of the proceedings and without having given the parties the opportunity to adduce any evidence, it will not be safe in the present matter for the Tribunal to simply find that the dispute is not within the jurisdiction of the Tribunal. The Tribunal bears in mind that an employer who is terminating the employment of a worker may avoid referring to the termination of the employment being by reason of any of the grounds listed in section 64(1A) of the Act. The Tribunal will have to hear evidence just like in the case of **Mr Shavindra Dinoo Sunassee (see above)** where the preliminary objection was taken together with the merits of the case. The two counsel appearing in the present matter may further enlighten the Tribunal as to the scope of the term “*exercise of any of the rights provided for in this Act or other enactment*” mentioned in section 64(1A)(f) of the Act. For the reasons given above, the Tribunal finds that the preliminary objection taken is premature at this stage. The Tribunal will proceed with the hearing of the matter and the objection may be taken together with the merits of the case, if need be.

SD Indiren Sivaramen

Acting President

SD Raffick Hossenbaccus

Member

SD Abdool Feroze Acharauz

Member

SD Arassen Kallee

Member

21 March 2022