

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 104/23

DETERMINATION

Before: -

Shameer Janhangeer	-	Vice-President
Francis Supparayen	-	Member
Ghianeswar Gokhool	-	Member

In the matter of: -

Mr Vikash CAHOOLESSUR

Disputant/Complainant

and

SEAFARERS' WELFARE FUND

Respondent

The present matter has been referred to the Tribunal for determination by the Supervising Officer of the Ministry of Labour, Human Resource Development and Training pursuant to *section 69A (2) of the Workers' Rights Act 2019* (the "Act"). The Terms of Reference of the dispute read as follows:

Whether the termination of employment of Disputant is justified or not in the circumstances and whether the Disputant should be reinstated or not.

Both parties were assisted by Counsel. Mr B. Ramdenee appeared for the Disputant instructed by Mr S. Jankee, Attorney-at-Law. Ms A. O. Ombrasine, Acting Assistant Parliamentary Counsel appeared for the Respondent instructed by Mr D. K. Manikaran, Principal State Attorney. Each party has submitted its respective Statement of Case in the present matter.

The Tribunal heard evidence from the parties in the matter. The Disputant adduced evidence on his behalf and was questioned by Counsel for the Respondent. The Respondent's representative and Officer-in-Charge, Mr Bokhoree deposed and was also questioned by Counsel for the Disputant.

Learned Counsel for the Disputant notably submitted that for there to be reinstatement, the claim must be justified, the worker consents to reinstatement and the relationship between the Disputant and the former employer has not broken down irretrievably. On the first aspect of whether the claim is justified, Counsel referred to *section 64 (2)(a)(v)* of the *Act* as it was prior to its amendment in 2022. Despite the explanations of the Disputant dated 28 January 2022, the Respondent did not terminate his employment and initiated a disciplinary committee as per letter dated 17 February 2022. The Respondent did not terminate the Disputant's employment within seven days of the written explanations. It was notably submitted that the legislator does not legislate in vain citing the judgment of *Mungur v The Municipal Council of Quatre Bornes* [2023 SCJ 77]. Counsel further relied on the Privy Council decision in *Mauvilac Industries Ltd v Ragoobeer* [2007] UKPC 43 in contending that the Disputant's employment was not terminated within seven days of his written explanations. Reference was also made to the recent decision in *Pierre Louis & Anor. v Pointe Cotton Resort Hotel Co. Ltd* [2023 SCJ 366].

Learned Counsel for the Disputant also submitted on the duration of the oral hearing. Referring to *section 64 (11)* of the *Act*, the time limit imposed on the disciplinary committee is mandatory. Counsel sought to distinguish the case of *Dr Ng Kuet Long v The Medical Council of Mauritius* [2019 SCJ 1] and relied once more on *Mauvilac Industries Ltd (supra)*, which was decided in the context of labour law in submitting that the time limit is strict and that the 60-days delay has been incorporated for a specific reason. Reference was also made to *Atchia v Air Mauritius Ltd (under administration)* [2021 SCJ 206] in submitting that labour laws are of public order. The decision to terminate was based on the findings of the disciplinary committee as per paragraph 7 of the Respondent's Statement of Defence.

Learned Counsel for the Disputant further submitted on whether the relationship has irretrievably broken down between the Disputant and the Respondent. The stand of the Respondent on this issue resolves around the charges. Reference was made to the Australian decision in *Perkins v Grace Worldwide (Aust) Pty Ltd* [1997] IRCA 15, where the test applied was one of impracticality under Australian law. Counsel recognised that the decision is not binding

but is persuasive and can assist the Tribunal on the issue of trust. As per the decision, the onus is on the party claiming that the relationship has broken down to come to proof. Regarding the staff of the Respondent, Counsel submitted that charge H regarding Mr Ubhee was not proven; the intern no longer works at the Respondent; and no action relating to Mr Bharossa was taken against the Disputant in 2014, the charge being based solely on the words of the former. Regarding the implementation of Board decisions, there has been no prejudice suffered by the Fund. Overpayments made have been refunded and the Disputant was not the only one approving payments. On the letter sent to a third party by the Disputant, no prejudice has been proved.

On the other hand, Learned Counsel for the Respondent first alluded to the objects of the Respondent under the *Seafarers' Welfare Fund Act 2008*. She then proceeded to submit on the chronology of the disciplinary committee. The committee notably proceeded in a manner allowing the Disputant to be present throughout and to be legally assisted. Disputant and his Counsel had no objection that the statutory delay be extended on not less than four occasions. This demonstrates fairness on the part of the disciplinary committee and compliance with natural justice. As per the proceedings, it was clear that the Disputant would not insist on the issue of delay. Reference was made to the Privy Council judgment of *Alphamix Ltd v The District Council of Rivière du Rempart [2023] UKPC 20* on how Counsel can bind his client. This issue was also taken up in *Gobella Ltd v MRA [2023 SCJ 338]* where it was stated that whatever statement attributed to Counsel would bind the client.

Regarding the issue of notification of termination of employment within seven days, Learned Counsel for the Respondent highlighted the specificities of the case whereby the Disputant chose not to reply to Mr Bokhoree but to the Chairman. This also demonstrated a degree of fairness and a desire to give the employee an opportunity to explain himself before a decision is taken. Counsel notably referred to *section 64 (2)(a)(v)* of the Act. Where there is an oral hearing, this would trigger the application of another time period as from the completion of the oral hearing. There has been no breach of this period; the seven days delay has been complied with. Counsel also distinguished the decision in *Mauvilac Industries Ltd (supra)* which applied to then *section 32* of the *Labour Act* and in issue was the notification of the decision. In the present matter, the disciplinary hearing was completed on 14 February 2023 and the Disputant was informed of his termination on 17 February 2023.

Regarding *section 64 (11)* of the Act, Counsel submitted that the legislator did not cater for any outcome should there be failure to comply. As per the *Interpretation and General Clauses*

Act, the word 'shall' is not always to be read as shall but may be permissive in certain circumstances. The legislator wants to send a strong message to protect the interest of the employee and set a time limit. The judgment of *Meeheelaul v Maubank Ltd* [2023 SCJ 281] was referred to where the Court expatiated on the rationale for delay being based on the need to enable the worker to know the charges, prepare himself and acknowledge. The judgment of *Lateral Holdings Ltd v Murdamootoo* [2021 SCJ 19] on delay before the Court was also referred to. No prejudice was caused to the Disputant because of the delay as he was legally represented throughout and was under pay during suspension.

Counsel for the Respondent moreover submitted regarding the relationship between the Disputant and the Respondent. She notably referred to the charges and their seriousness. The Disputant has demonstrated a mindset prejudicial to the employees, the Fund and its reputation. The impact of having someone like him brought back to the institution would be very prejudicial. The charges on their own are extremely serious and prejudice the Fund, the employees and the welfare of seafarers. Reference was made to *Lagane v Rey & Lenferna Ltd* [2020 SCJ 204] on how acts done after working hours may impact in referring to the third party issue. Actions done outside working hours or outside work premises do not automatically mean that they cannot be faulted under employment law. The judgment of *State Bank of Mauritius v Outim* [2009 SCJ 349] was also referred to in the context of statutory interpretation and methodology regarding *section 64 (11)*. Counsel cited the case of *British American Tobacco (Mtius) PLC v Begue* [2016 SCJ 363] where it is well established that there may be cases where gross misconduct may not be sufficiently established but nevertheless the bond may be found to be broken. It was also submitted that the Disputant has not come with clean hands and has not revealed everything which demonstrates a lack on his part. Reference was also made to the judgment of *Heckel v Professional Architects' Council* [2022 SCJ 14], a matter of judicial review.

Having duly considered the evidence on record and the respective submissions of learned Counsel, the Tribunal, as per the Terms of Reference of the present matter, must determine whether the termination of employment of Mr Cahoolessur is justified or not and whether he should be reinstated or not.

The Disputant was the Secretary of the Seafarers' Welfare Fund. By letter dated 24 January 2022, eleven charges of malpractice were laid against him and he was asked to give his explanations to the charges by latest 31 January 2022. On 28 January 2022, the Disputant forwarded his explanations on the charges in a letter addressed to the Chairman of the Respondent. On 17 February 2022, the Respondent informed the Disputant that a disciplinary

committee had been set up in relation to the eleven charges laid against him and was scheduled for 22 February 2022.

It has not been disputed that the disciplinary committee conducted its first oral hearing on 25 May 2022. The disciplinary committee was moreover reconstituted on two occasions in August/October 2022 and in January 2023. The Disputant also changed Counsel twice over the course of the disciplinary process. The proceedings, after several sittings, eventually started anew on 19 January 2023, with hearings on 7, 8 and 14 of February 2023. The findings of the disciplinary committee were received by the Respondent on 16 February 2023. The Disputant was thereafter served with a letter dated 17 February 2023 whereby he was informed that nine of the eleven charges had been proved against him and that the Respondent's Board had decided to terminate his employment with immediate effect. The Disputant is now before the Tribunal seeking reinstatement in his former post.

The first argument that had been advanced by the Disputant is that following his written explanations dated 28 January 2022, the Respondent should have terminated his employment within seven days. Instead, the Respondent initiated a disciplinary committee on the eleven charges laid against the Disputant as per its letter dated 17 February 2022. Reference was notably made to *section 64 (2) (a)* of the *Act* in this regard as it was prior to its amendment in 2022. This *subsection* notably provides as follows:

64. Protection against termination of agreement

...

(2) *Subject to subsection (3), no employer shall terminate a worker's agreement –*

(a) *for reasons related to the worker's alleged misconduct, unless*

(i) *the employer has, within 10 days of the day on which he becomes aware of the alleged misconduct, notified the worker of the charge made against the worker;*

(ii) *the worker has been afforded an opportunity to answer any charge made against him in relation to his alleged misconduct;*

(iii) *the worker has been given at least 7 days' notice to answer any charge made against him;*

- (iv) *the employer cannot in good faith take any other course of action; and*
- (v) *the termination is effected not later than 7 days after the worker has answered the charge made against him, or where the charge is the subject of an oral hearing, after the completion of such hearing;*

As can be clearly gathered from the above *subsection*, the worker must be notified of the charge made against him and has to be afforded an opportunity to answer to the charge. It should also be noted that the worker must be given at least seven days' notice to answer to any charge made against him. The provision, at *section 64 (2) (a)(ii)*, does not specify what form the opportunity of answering to the charge must take. An opportunity to answer to the charge can be in writing, in an oral hearing, or both. As the law does not specify how it is that the worker is to answer to the charge, the employer therefore has a discretion on the form of opportunity of answering to the charge it affords to the worker.

In this context, the following can be noted from *Dr D. Fok Kan in Introduction au Droit du Travail Mauricien, 1/Les Relations Individuelles de Travail, 2ème ed. 2009, p. 431*, on the form of answering to the charge that the employer affords to the worker:

Eventuellement le choix entre ces deux formes de 'opportunity to answer the charge', écrite ou verbal, revient à l'employeur. Celui-ci doit toutefois s'assurer que dans tous les cas l'employé a pu bénéficier d'une procédure qui soit 'fair' selon les circonstances de l'espèce.

The following may be also noted from the Judicial Committee of the Privy Council decision in *Bissonauth v The Sugar Insurance Fund Board [2007] UKPC 17* on the employer's duty to afford the worker an opportunity to answer to the charge:

After all, the employer can decide on the basis of what the employee says in his reply, whether there should be a hearing, or whether the employer can reach a decision without further ado.

In the present matter, the Respondent's decision to initiate a disciplinary committee following its request for written explanations cannot be faulted as long as the Respondent has satisfied the mandatory requirement of the law of affording the Disputant an opportunity of

answering to the charges laid against him. The Tribunal is comforted in its view in light of the subsequent amendments made to *section 64* by the *Finance (Miscellaneous Provisions) Act 2022* (Act No. 15 of 2022 with effect from 1 July 2022), whereby *section 64 (2) (a)* read as follows:

64. Protection against termination of agreement

...

(2) Subject to subsection (3), no employer shall terminate a worker's agreement –

(a) for reasons related to the worker's alleged misconduct, unless –

(i) the employer has, within 10 days of the day on which he becomes aware of the alleged misconduct, notified the worker of the charge made against the worker;

(ii) the worker has been given an opportunity to answer any charge made against him in relation to his alleged misconduct –

(A) in writing;

(B) in an oral hearing; or

(C) in an oral hearing following his written explanations;

(iii) the worker has been given at least 7 days' notice to answer any charge made against him;

(iv) the employer cannot in good faith take any other course of action; and

(v) the termination is effected not later than 7 days after the worker has answered the charge made against him –

(A) in writing;

(B) in an oral hearing; or

(C) in an oral hearing following his written explanations, whichever is applicable;

(aa) *where, for the purpose of paragraph (a)(iii), the worker is given an opportunity to answer any charge in an oral hearing following his written explanations, the 7 days' notice shall be counted only in respect of the written explanations;*

It can thus be seen, through the amendments brought in 2022, that the legislator has clarified the forms of opportunity of answering to the charge that must be afforded to the worker as per *section 64 (2) (a)(ii)* of the Act and this includes allowing the worker an opportunity of answering to the charge in an oral hearing following written explanations. It may also be noted that the aforesaid *subsection* was further amended in July 2023 though this is not relevant to the present matter.

On the facts of the present matter, the Disputant addressed his written explanations to the Respondent's Chairman despite the Respondent's initial letter dated 24 January 2022 being signed by its Officer-in-Charge. As per the Respondent's letter dated 17 February 2022, it is clearly stated that there was no reply from the Disputant as at date and that a disciplinary committee has been set out in relation to the charges laid against him. However, Mr Bokhoree, in evidence, stated that the Disputant's explanations were remitted to him on 3 February 2022 and that the Respondent's Board was not satisfied with the explanations. It must also be noted that at paragraph 3 d of the Respondent's Statement of Defence (which Mr Bokhoree confirmed as to its accuracy under oath), it has been averred that the Disputant's explanations were received and considered by the Respondent's Board which decided that the explanations were not satisfactory and decided to set up a disciplinary panel.

Despite the inconsistency between paragraph 3 d of the Respondent's Statement of Defence and the Respondent's letter dated 17 February 2022 regarding the Disputant's written explanations, in view of the broad ambit of *section 64 (2) (a)(ii)* of the Act (as it was prior to the amendment in 2022), the Respondent could not in law be precluded from setting up a disciplinary committee. It can be seen that the Respondent was merely conforming with the law in giving the Disputant a further opportunity to answer to the charges by way of an oral hearing in not having been satisfied with his written explanations.

It has not been disputed that the disciplinary committee eventually heard and completed its proceedings in January and February of 2023 despite having been set up in February 2022 and submitted its findings to the Respondent on 16 February 2023. By letter dated 17 February 2023,

the Respondent terminated the Disputant's employment with immediate effect. The last hearing the disciplinary committee was held on 14 February 2023. It cannot therefore be said that the Disputant's employment was terminated later than the seven days provided under *section 64 (2) (a)(v)* of the *Act* (as it was prior to July 2022) following the completion of the oral hearing. Moreover, the issue that the Disputant's termination of employment should have been effected within seven days of his written explanations does not arise as a disciplinary committee had been set up to hear the charges laid against the Disputant following the written explanations.

Another pertinent issue with regard to the present matter is the time taken by the disciplinary committee to conclude its proceedings. The committee was set up as per the Respondent's letter dated 17 February 2022. Its first sitting was set for 22 February 2022. The proceedings before the committee eventually started on 25 May 2022 and continued on 8 and 27 June 2022 and 14 July 2022. On 29 July 2022, the Chair of the committee drew parties' attention that the disciplinary committee had gone beyond the 60 days delay. On 2 August 2022, Disputant's Counsel withdrew from the case and the Disputant retained the services of a new Counsel. Beginning August 2022, two assessors could not continue and the disciplinary panel had to be reconstituted. On 8 December 2022, Counsel for the Disputant informed that he was withdrawing from the matter. The disciplinary hearing eventually proceeded on 7, 8 and 14 February 2023. As per Mr Bokhoree's evidence, the hearings in February 2023 were before another reconstituted panel. The committee remitted its findings to the Respondent on 16 February 2023. The Respondent has recognised, notably at paragraph 11 of its Statement of Defence, that the hearing before the disciplinary committee went beyond 60 days.

It is apposite to note *section 64 (11)* of the *Act* in relation to the time accorded in law to a disciplinary committee to complete its proceedings:

64. Protection against termination of agreement

...

(11) (a) The disciplinary hearing initiated against a worker under this section shall be completed within 30 days of the date of the first oral hearing save and except, and subject to paragraph (b), where owing to the illness or death of any of the parties or witnesses, or the reconstitution of the disciplinary panel or change in the legal or other representatives of the parties, such hearing cannot be completed during that delay.

(b) The parties may agree to extend the delay referred to in paragraph (a), provided that the disciplinary hearing is completed not later than 60 days of the date of the first oral hearing.

It can clearly be noted that a disciplinary hearing must be completed within 30 days of the date of the first oral hearing except where owing to illness or death of parties or witnesses, the reconstitution of the disciplinary panel or change in the legal or other representatives of the parties, the hearing cannot be completed within this delay. Parties are allowed to extend the delay provided that the disciplinary hearing is not completed later than 60 days of the date of the first oral hearing.

Most recently, the Tribunal had to opportunity to pronounce itself on the provisions of *subsection (11)* in the matter of *Chellen and Airports of Mauritius Co. Ltd (ERT/RN 98/23)* in the following terms:

The law as it stands is that the disciplinary hearing must be completed not later than 60 days of the date of the first oral hearing. This applies to all disciplinary hearings initiated against a worker under section 64 of the Workers' Rights Act including in the present matter. ... Once the Respondent chose to give Complainant an opportunity to answer the charges made against him in relation to the alleged misconducts in an oral hearing, the oral hearing should be completed as per the provisions of the Workers' Rights Act.

Counsel for the Respondent has notably argued that the law does not provide for any consequence for a breach of *section 64 (11)* of the Act. This proposition has not been disputed. However, the wordings of *subsection (11)* are of a mandatory nature in as much as it provides that the disciplinary hearing '*shall be completed within 30 days of the first oral hearing*'. Despite Counsel's argument, referring to the *Interpretation and General Clauses Act*, that the word '*shall*' can be interpreted as permissive, it is a well-known legal principle that the legislator does not legislate in vain. In amending *paragraph (b)* of *subsection (11)* in 2021 via the *Finance (Miscellaneous Provisions) Act 2021 (Act No. 15 of 2021)* by introducing the 60 days' time limit for the completion of a disciplinary hearing, the legislator aimed to prevent such hearings from unduly dragging on as it has on the facts of the present matter.

It cannot also be overlooked that labour laws are of public order as has been noted by *Dr D. Fok Kan* as cited in *Atchia v Air Mauritius Ltd (under administration) (supra)*:

*As is aptly explained in the following extracts from **Introduction au droit du travail mauricien 1/Les Relations Individuelles de Travail, Dr D. Fok Kan, 2ème édition (2009)** at p.1:*

“Le droit du travail concerne seulement les contrats de louage des gens de travail qui selon l’art. 1780 sont régis par le Labour Act. Le droit du travail est ainsi perçu ici comme étant un contrat. Il s’agit du “droit qui gouverne les rapports juridiques naissant de l’accomplissement par un travailleur subordonné d’un travail pour le compte d’autrui”. Nous sommes ici dans le cadre des relations individuelles qui existent entre un employeur et chacun des employés individuellement. Ces relations sont ainsi régies par le contrat de travail de chacun de ces employés, sujettes éventuellement aux dispositions impératives de la loi.”

The contract of employment between an employer and a worker is therefore imperatively governed by the applicable provisions of the law as enacted by the legislator. The learned author (supra) goes on to explain at pages 2 and 5 that:

*“Si en droit privé, la loi a normalement seulement pour but de prévoir un cadre à l’intérieur duquel c’est aux parties elles-mêmes d’organiser leurs affaires, le droit du travail lui par contre à une finalité précise, celle de “la protection du faible contre le fort” [**Droit du travail, J. Rivero et J. Savatier, Collection Thémis, 12ème ed. (1991), p. 32**]*

“Ces diverses interventions du législateur mauricien, soit de sa propre initiative ou soit pour se conformer aux conventions de l’OIT, démontrent bien que la finalité du droit du travail auquel se réfèrent Rivero et Savatier est bien la protection du faible contre le fort. Les législations du travail sont ainsi à ce titre des législations d’ordre public.”

The purpose of labour legislation being the protection of the weak against the strong, i.e. the protection of the worker against the employer, it would not be in order to interpret the time limit set for a disciplinary hearing under *section 64 (11)* of the Act as not being mandatory. It must also be noted that Counsel for the Respondent recognised in her submissions that the legislator wanted to send a strong message to protect the interests of the employee in setting the time limit.

Counsel for the Respondent has also relied on the Privy Council decision in *Alphamix Ltd (supra)* on how Counsel can bind its client. This was cited in the context of the Counsel not

insisting on the issue of delay before the disciplinary committee. Whatever may have happened before the disciplinary committee was within the control and jurisdiction of the committee and it is not for the Tribunal to review the proceedings of the committee nor is it empowered to do so. The disciplinary committee had carriage of its proceedings, was independent and was deemed to know the law. It may also be noted that the Disputant has not raised any issue of natural justice regarding the proceedings before the disciplinary committee in the present matter.

In this optic, the following can be noted from *Tyack v Air Mauritius Ltd & Anor.* [2010 SCJ 257] on the particular characteristics of a disciplinary committee:

A Disciplinary Committee is not a teleguided machine to do the bidding of the employer. It is an impartial and independent body set up to determine whether disciplinary actions may be taken against an employee in a given situation.

Counsel for the Respondent also relied on the Supreme Court decisions in *Meeheelaul v Maubank Ltd (supra)* and *Lateral Holdings Ltd v Murdamootoo (supra)* on the issue of delay before the disciplinary committee. Although the judgment in the former case mentions several postponements before the disciplinary committee, the relevant law that was applicable was the *Employment Rights Act 2008*, which has now been repealed by the present *Act* in 2019, and which did not set a time limit for a disciplinary hearing. The case of *Meeheelaul* cannot therefore be said to apply to the present matter. Likewise, the matter of *Lateral Holdings Ltd* pertained to the then *Employment Rights Act 2008* and the issue of delay was in relation to the hearing of the case before the Industrial Court. Counsel for the Respondent also cited the case of *State Bank of Mauritius v Outim (supra)*, a decision which related to the issue of confidentiality under the *Banking Act 1988*.

It has also been argued that no prejudice caused to the Disputant because of delay incurred in the disciplinary hearing as he was at all times legally represented and was paid his salary when under suspension. It must be noted that to be legally represented before a disciplinary hearing is a right accorded to the worker pursuant to *section 64 (7)* of the *Act* and is not a favour being made to him. Whether the Disputant may not have suffered any prejudice because of the delay in the disciplinary process is not a due consideration in view of the wordings and the mandatory nature of the time limits of *section 64 (11)* of the *Act*. In any event, the time taken by the disciplinary committee to conclude its proceedings can by itself be deemed to be prejudicial.

In view of the above, it is clear that the disciplinary committee has exceeded its mandate in concluding its proceedings well beyond the statutory time limit set in *section 64 (11)* of the *Act*. As per the Respondent's Statement of Defence, at paragraph 7, it has notably been averred that the Disputant's employment was terminated in light of the findings of the disciplinary committee. This was moreover confirmed by Mr Bokhoree in his evidence. The letter of termination dated 17 February 2023 also mentions that the Board has considered the report of the disciplinary committee and concluded that the Disputant committed acts of malpractice, and has accordingly decided to terminate the Disputant's employment with immediate effect.

It is trite law that an employer is not bound by the findings of a disciplinary committee (*vide Lateral Holdings Ltd (supra)*, *Moortoojakhan v Tropic Knits Ltd [2020 SCJ 343]* and *Planteau de Maroussem v Société Dupou [2009 SCJ 287]*). In particular, the following was notably held in *Planteau de Maroussem*:

Furthermore, the employer is not bound by the recommendations of the Disciplinary Committee and is free to reach its own decision in relation to the future employment of his employee, subject to the sanction of the Industrial Court.

However, it is clear in the present matter that the Respondent has relied on the findings of the disciplinary committee in terminating the Disputant's employment. The committee's findings itself were delivered to the Respondent on 16 February 2023 well after the maximum statutory limit of 60 days and, as previously noted, the last hearing before the disciplinary committee was on 14 February 2023. Having noted that the disciplinary committee has acted outside its mandate in exceeding the statutory time limit, it was therefore unreasonable for the Respondent to have relied on the committee's findings to terminate the Disputant's employment. In the circumstances, the Tribunal can only find that the Disputant's termination of employment was unjustified and that his reinstatement is justified.

Having found the Disputant's reinstatement to be justified, the Tribunal must now determine whether it can order that the Disputant be reinstated to his former position at the Respondent. In this respect, it would therefore be appropriate to refer to *section 70A (3) & (4)* of the *Employment Relations Act*:

70A. Referral by supervising officer

...

(3) Where the Tribunal finds that the claim for reinstatement of a worker is justified, the Tribunal shall –

(a) subject, to the consent of the worker; and

(b) where it has reason to believe that the relationship between the employer and the worker has not irretrievably been broken,

order that the worker be reinstated in his former employment and, where it deems appropriate, make an order for the payment of remuneration from the date of the termination of his employment to the date of his reinstatement.

(4) Notwithstanding subsection (3), where the Tribunal finds that the claim for reinstatement of a worker is justified but the Tribunal has reason to believe that the relationship between the employer and the worker has irretrievably been broken, it shall order that the worker be paid severance allowance at the rate specified in section 70(1) of the Workers' Rights Act 2019.

It would therefore be incumbent on the Tribunal, in deciding whether to make an order for reinstatement, to ascertain that the relationship between the Disputant and the Respondent has not irretrievably been broken. It has been noted that the Disputant has relied on the Australian decision in *Perkins v Grace Worldwide (Aust) Pty Ltd (supra)* on the test to be applied in this respect. As per the decision, Mr Perkin's employment was unlawfully terminated but it was found that reinstatement was impracticable. It was notably stated in the judgment that trust and confidence is an essential ingredient of an employment relationship and that the onus of establishing the loss of trust and confidence rests on the party making the assertion. The test of reinstatement was one of impracticability under *section 170EE (2)* of the *Workplace Relations Act 1996* as per the decision.

A perusal of this decision shows that the law relating to reinstatement differs greatly from our law as may be gleaned from *section 70A* of the *Employment Relations Act*. It would suffice to say that the test of impracticability in determining whether there should be reinstatement is not present in our law. The test of reinstatement in the aforesaid decision would not be of any use in the present context as has also been appropriately alluded to by Counsel for the Respondent. It should also be noted that Counsel for the Disputant did recognise that the decision in *Perkins (supra)* is not binding but may be persuasive.

In the present matter, the Disputant in seeking the remedy of reinstatement has onus to prove that his reinstatement is justified. The Disputant having registered a complaint with the Supervising Officer of the Ministry of Labour claiming reinstatement has the burden of proving that he should be reinstated. It would not therefore be in order to say that the onus is on the Respondent to show that reinstatement is not justified as suggested by Counsel for the Disputant in relying on the decision of *Perkins (supra)*.

It should be noted that the Disputant's Statement of Case does not contain any averment on whether the relationship between the Disputant and the Respondent still holds good. The aforesaid Statement of Case has couched its grounds for reinstatement under paragraphs 28 to 34. The averments of these paragraphs notably relate to the illegal and unjustified termination of the Disputant's employment on the grounds that he had answered to the charges on 28 January 2022 and his agreement was terminated on 17 February 2023; and that the maximum statutory delay of 60 days to complete the disciplinary hearing had lapsed meaning that the Respondent could not rely on the findings to terminate his employment.

It is trite law that, in civil cases, a court cannot travel outside the pleadings (*vide Compagnie Sucrière de Bel Ombre Ltée v Bungaroo & ors [1996 SCJ 334]*). Moreover, the following may be noted from what was held in *Tostee v Property Partnerships Holdings (Mauritius) Ltd [2015 SCJ 41]*:

Counsel for the petitioner is, in view of those authorities, right in his submission on it not being possible for a party or permissible for the Court to rely on evidence on matters not pleaded in order to come to a finding of fact.

...

In practice, our courts have also been guided by French and English authorities to reach the conclusion that the court should only consider matters which have been introduced in the pleadings. It is the responsibility of the defendant/respondent to aver matters in its plea that will enable the respondent to avail himself the benefit of having his version considered by the court, especially if it is a matter of fact which is supported by the law.

Although the Tribunal is not strictly a court of law, it has been equated to a court of law by the Supreme Court in *Sooknah v CWA [1998 SCJ 115]*. Moreover, in *Greedharee v Mauritius*

Port Authority [2016 SCJ 111], it was notably held that the decision of the Tribunal is, for all intents and purposes, a judgment.

Despite the lack of any averment in the Disputant's Statement of Case as to the state of the relationship between himself and the Respondent, the Disputant did notably state, when questioned by his Counsel on why he should be reinstated, that he is a professional, he has contributed to the Fund, the job is his '*gagne pain*' by which he earns his salary and it is a '*survie*' for his family. He also added that he has two children at university; the post is a prayer for him, it is everything to him and that he has not occupied any other post. The Tribunal however notes that the reasons advanced by the Disputant do not bear directly on the relationship between him and the Respondent but are reasons personal to him as to why he wishes to be reinstated.

On the other hand, the Respondent has, in its Statement of Defence, notably averred, at paragraphs 13 and 14, that reinstatement should not be ordered as the Disputant's actions have destroyed irretrievably the trust relationship between him and the employer. This stance has moreover been supported by Mr Bokhoree in his evidence. Although, when cross-examined, Mr Bokhoree was not very clear regarding any prejudice caused to the Respondent, he maintained that the Disputant could not be reinstated. Despite the tenor of Mr Bokhoree's evidence, the onus is on the Applicant, as has previously been noted, to show that the relationship between him and the Respondent has not irretrievably broken down.

In the circumstances, the Tribunal cannot be satisfied that the Disputant has proved that the relationship between himself and the Respondent has not irretrievably broken down. The Tribunal can only therefore find, on the evidence before it, that the relationship between the Disputant and the Respondent has irretrievably been broken. Consequently, the Tribunal cannot make any order for reinstatement in favour of the Disputant. As provided under *section 70A (4)* of the *Employment Relations Act*, the Tribunal orders that the Disputant be paid severance allowance at the rate specified in *section 70 (1)* of the *Act*.

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SD Shameer Janhangeer
(Vice-President)

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SD Francis Supparayen
(Member)

.....
SD Ghianeswar Gokhool
(Member)

Date: 11th October 2023

