

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 21/2021

AWARD

Before: -

Shameer Janhangeer	-	Vice-President
Raffick Hossenbaccus	-	Member
Rabin Gungoo	-	Member
Yves Christian Fanchette	-	Member

In the matter of: -

Mr Denis Gerard Ashley JOLA

Disputant

and

AIR MAURITIUS LIMITED

Respondent

The present matter has been referred to the Tribunal for arbitration by the Commission for Conciliation and Mediation pursuant to *section 69 (9)(b)* of the *Employment Relations Act* (the "Act"). The Terms of Reference of the dispute read as follows:

After having accepted a salary decrease of more than 50%. My employer want to send me on LWP ... without going through the Redundancy Board.

Employer is refusing me Paid Leave without any reasonable cause

Non-respect of terms and conditions of collective agreements

Non-Payment of salary due

The Disputant was *inops consilii*; he was however assisted by a Mackenzie friend, Mr N. Koonjul. The Respondent was assisted by Counsel Mr V. Reddi, who appeared together with Mr A. Sunassee and Miss J. Somar, instructed by Mr R. Bucktowonsing, SA. Both parties have submitted their respective Statement of Case. It must be noted that the Respondent was initially styled as '*Air Mauritius Limited (Administrators Appointed)*' upon the referral of the dispute, but this was eventually amended to reflect that it has exited administration.

THE DISPUTANT'S STATEMENT OF CASE

The Disputant has notably averred that the dispute is in relation to terms and conditions of employment of the letter called '*offer of continuation of employment*' which is in breach of the Collective Agreement 2020 ("CA 2020"); temporary reduction of employees without the approval of the Redundancy Board; non-respect of terms and conditions of Collective Agreements; right to paid leave before leave without pay; and non-payment of salary due. The Disputant is not seeking to challenge the CA 2020.

The Respondent was placed into voluntary administration on or about 22 April 2020. The Disputant was due an end of year entitlement contract gratuity of 25% of the yearly basic paid on the anniversary date of his contract as per paragraph 7 of the 2011 Collective Agreement. The Respondent also unilaterally decided to modify its overseas allowance benefits; against which there was a ruling. The Respondent is not even respecting the new Overseas Duty Allowance ("ODA"). As per the allowance table, payment is 100 euros for the first 24 hours and 60 euros for every extra 12 hours. However, the company is only paying 100 euros per day if the stay is several days.

The Mauritian Airline Pilots Association ("MALPA") had no choice but to forego the two Collective Agreements in place by signing a new Collective Agreement and a new Procedure Agreement. Shortly after, individual letters of offer to continue in employment were sent to a limited number of pilots on 5 August 2020. This letter contained several clauses which were not discussed and not stipulated in the new Collective Agreement. The Disputant was blindly misled into signing same in view of the stipulation that the terms of the offer were in alignment of CA 2020. He later noticed that there were material differences with the new Collective Agreement and notably referred to the leave without pay provision at clause 2.

Clause 2 with respect to leave without pay has not been provided for in the new Collective Agreement. It was not stipulated in the Collective Agreement that the Respondent can impose same unilaterally; yet in the letter of offer, it is open for the Respondent to impose 18 months leave without pay to all pilots over a period of three years. This cannot stand as the terms of the Collective Agreement must prevail over individual contracts of employment. Leave without pay as a cost cutting tool was never discussed with the unions at the time of the signing of the new Collective Agreement.

The Administrators informed the Union that the contract could be returned. The Disputant did not return same as he did not wish to lose his job or be made redundant. Sending him on leave without pay is akin to him being made temporarily redundant and is therefore a temporary reduction of employees. As per the law, only the Redundancy Board has control over reduction of workforce for economic reasons. The Respondent must make an application to the Redundancy Board if it wishes to reduce the number of employees. With the application of leave without pay coupled with 50% decrease in emoluments, he will find himself with a 75% cut of his previous annual remuneration. The stress of knowing that the Respondent can at any time send him on leave without pay without notice is inhuman and against principles and best practices of good employment relations.

Regarding paid leave, the Disputant has averred that as per the latest Collective Agreement and the MALPA Employee Allowance and Benefits Policy, he is entitled to 32 days of paid leave per year. His balance of paid leave was 38 days as at 1 January 2021. He requested paid leave and was informed that same would be granted depending on operational exigencies but was put on leave without pay for the same period. He contacted his manager to enquire why he had not been given leave but was instead put on leave without pay. He escalated the matter to the Human Resource Manager who turned a deaf ear to his request. As per the MALPA Employee Allowance and Benefits Policy, he should have been allowed to fix at least half of his paid leave. Paid leave for those in his category should have been exhausted before leave without pay applied. The Disputant has also averred that he was certified sick by a doctor as from 23 December 2020 to 2 January 2021. However, the Respondent refused to grant him sick leave on 1st and 2nd of January 2021 in complete disregard to best employment practices. He had to appeal to the Ministry of Labour. The Disputant has also set an exhaustive list of prayers in his Statement of Case.

THE RESPONDENT'S SECOND AMENDED STATEMENT OF CASE

The Respondent has notably averred that it went into administration on 22 April 2020 and Administrators were appointed and urgent measures were needed to manage cash flow issues and to restructure the business. Discussions with recognised trade unions at the company have led, in most cases, to new Collective Agreements. A new Collective Agreement with MALPA was reached and the contracts of foreign pilots were terminated. In view of the company's financial situation, these measures were not enough and the implementation of a leave without pay scheme became necessary. In August 2020, 116 pilots (all members of MALPA), not identified for redundancy, were made individual offers of employment containing a leave without pay clause. All the pilots who were made the offer accepted. After the initial period granted to accept the contract, the pilots were given a second opportunity to return same in case they did not agree to its terms. None did so. The Disputant can hardly claim that the contracts have not been accepted by the pilots or are in breach of the Collective Agreement in place.

On 28 and 29 September 2021, the Respondent's creditors approved the Deed of Company Arrangement ("DOCA") proposed. The Respondent's stance is that all amounts prior to 22 April 2020, i.e., pre-dating the administration, are subject to the DOCA. All amounts accruing after 22 April 2020, i.e., post-administration, will be paid according to legal entitlements out of funds available. Neither the Disputant nor the individual pilots have ever had an issue with a scheme for leave without pay; from discussions with them, it was understood that such a scheme would need to be implemented. A number of measures were taken to create a breathing space for the administration to continue, which included applying to place the work force on part time work to preserve resources and providing individual pilots with individual contracts, which included the leave without pay clause.

The individual contracts offered reflected the terms of the Collective Agreement with the addition of the leave without pay clause. The individual pilots signed their contracts ahead of the expiry of the time period involved. Leave without pay has been implemented on a fair and equitable basis considering the fleet which is in operation, aircraft sold, training requirement of pilots and recency constraints. As from 1 August 2021, all pilots have returned to full time work at Air Mauritius Ltd, when operational requirements so warranted, given the Government policy decision to open borders as from 1 October 2021. The provision for leave without pay, in the circumstances, was freely consented to by the individual pilots concerned and it is legal. It has also been averred that the Covid-19 pandemic was a *force majeure* in relation to the airline industry.

Regarding the award of 1995, which has been referred to in the context of ODA, this was delivered well before the Respondent became insolvent and went into administration to save its business. The then Tribunal took into consideration facts and circumstances which then existed no longer apply. Given the Respondent's financial situation, it could not and is unable to pay meal allowances well above the normal benchmark requirements or beyond its means.

The Respondent has moreover averred that even prior to the pandemic and administration, it had a bloated workforce of 244 employees per aircraft. The purpose of administration was and is to enable the Respondent to continue in existence. It was inevitable for decisions to be taken that would have an impact on the state of affairs which existed prior to administration. The existing pre-administration circumstances drove the Respondent into a state of insolvency. The Respondent could not maintain such work practices which are no longer suited to the current environment, and which were not sustainable during administration with a view to the Respondent's survival.

The Respondent has notably referred to clause 4 of Appendix 1 to the letter of offer. The pilots, including the Disputant, were given the opportunity of returning the new contract of employment if they so wished but the Disputant chose not to do so. The vast majority of MALPA members, including the Disputant, have agreed to the leave without pay clause and to vary any Collective Agreement in place in order to align it with individual contracts in place. The leave without pay clause was an alternative to redundancies, as MALPA itself recognised in facilitating an agreement before the Redundancy Board. The Disputant has admitted that he is a member of MAPLA, which is the sole bargaining agent for Mauritian pilots. The Disputant has no *locus standi* to speak on behalf of MALPA or the Airline Employees Association ("AEA"). Any averment of discrimination falls within the jurisdiction of the Equal Opportunities Commission not the Tribunal. The requirement for pilots to undergo quarantine or self-isolation after flights is a decision of the Ministry of Health and Wellness and related to public safety. The current volatile nature of operations does not allow for long term roster planning.

THE DISPUTANT'S STATEMENT OF REPLY

The Disputant has notably averred that the Respondent declared about 47 million euros in cash or equivalent and 17 million euros as long-term deposit in the financial report of 22 April.

The company would not have been in deficit as at 22 April 2020. The Administrators have acknowledged in their report that they did not investigate the affairs of the company, nor have they carried out any audit or forensic exercise to verify the completeness or accuracy of the financial information provided by the Directors. The Disputant takes note of the admission that leave without pay has been imposed unilaterally after having agreed to a new Collective Agreement with MALPA and that same did not form part of the Collective Agreement. Although the Respondent is short of money, it is keeping employees identified for redundancy. The 18 pilots have been reemployed and sent on 5 years of leave without pay. Rs 9 billion has been budgeted for the Respondent in the 2020 budget speech. The Respondent does not have the moral right to invoke lack of funds after having taken back the 18 pilots under political pressure. Employees should stop paying for political interference. Several members of MALPA have rejected to be paid only 50% of salaries due before 22 June 2020.

It has also been averred that the Respondent is taking as excuse excess workforce as one of the main reasons for its demise. However, not much has been done to reduce this excess workforce. The decision to order new aircraft was unsustainable. Employees cannot be held responsible for mismanagement and political interference in the company. It is admitted that an individual contract of employment was issued to the Disputant. The Disputant never had any discussions with the Respondent on the application of leave without pay, which was a unilateral decision forced on the Disputant. The Disputant is quizzical as to why the Respondent never applied to the MIC Fund or took the Rs 9 billion already budgeted. Disputant notes the admission that the leave without pay in the individual contract does not reflect the terms of the new Collective Agreement. The Disputant was not identified for redundancy and was offered an individual contract containing terms not included in the Collective Agreement. No clear leave without pay plan has been communicated to the Disputant as to when he would be on leave without pay. The Government of Mauritius has not decreed Covid-19 as a *force majeure*. Regarding the Respondent's stand on the Permanent Arbitration Tribunal award, the Disputant takes note of its bad faith. As per Annex 9, gratuity was not paid in April 2020 as stated in paragraph 7 of the Collective Agreement.

The Disputant has further averred that an award is binding on all parties to whom it applies. Change in circumstances does not warrant unilateral changes to the Disputant's terms and conditions. Salary includes everything that is qualifiable and paid. The Meal Allowance was quantifiable and paid to the worker and is a defining part of his salary. The Respondent cannot unilaterally modify the Disputant's salary. The Meal Allowance was not above the normal benchmark and was calculated on the basis of food prices at the actual hotel. The new allowance of 100 euros per day is not enough for three healthy and balance meals and a snack. It is unfair

for the Respondent to have unilaterally reduced the Meal Allowance. The reduced allowance is only paid back after two months causing severe hardship and the Disputant loses in terms of bank fees and conversion rates. The Disputant has noted that the MALPA Employees and Allowance Benefits attached as Annex 15 to his Statement of Case is different to the Respondent's. The Respondent has modified the document without informing the Disputant of such a substantial change in his work conditions.

It has moreover been averred that on 24 September 2021, the Administrator informed employees that they must fill a form in order to be paid only 50% of unpaid salary and payment will only be made if an employee has filed a claim. The Disputant's claim amounted to Rs 3,717,815, but he was paid only Rs 661,952.15 representing about 18% of the claim. As per the previous MoU, the company had to pay the income tax as per the Collective Agreement in force at the time. However, this has been left to be paid by the Disputant. In order to plan for a life, the Disputant must be informed with adequate notice of his subsequent days-off and the Respondent should not change this unilaterally after it has been allocated.

The Respondent is no longer in administration and cannot hide behind this for the years to come. It is clear that the Respondent is using savings from employees and mainly pilots' emoluments to finance other aspects such as shares buy back. The Disputant has taken a 60% decrease in his annual income and has loans based on 50% of his previous salary. He cannot cover his financial commitments and cannot afford proper legal assistance. The Respondent has stated that all operations have resumed normally. It is therefore immoral to still hold leave without pay as an *'épée de Damoclès'* on the Disputant's head. The letter of offer made to the Disputant is contrary to the *Act* as it makes the Collective Agreement non-binding. The wording of Clause 4 is wide that its reasonableness is questionable. The Respondent made clear that this was the only offer available and returning the contract would be akin to the Disputant submitting his resignation. As per the terms of the contract, it was not offered to all pilots. However, the Disputant was made aware that same was offered to all pilots in employment at the time the letter was issued.

The Disputant has also averred that leave without pay must be given after an application to the Redundancy Board. The way leave without pay has been imposed is not in line with the law as the Disputant was not earmarked for redundancy. Leave without pay has resulted in a decrease of available pilots making the roster very tight. The employer should give the employee reasonable notice and the employer should not change the employee's day-off as it sees fit. The Respondent tends to constantly change the Disputant's roster with short notice. It is not

respecting the Disputant's right to a balance social life by changing his days-off and it also customary for the pilots to do training and quizzes during their days-off.

With the new Collective Agreement, the Disputant is only entitled to 32 days of leave per year. The employee contract or the Procedure Agreement does not mention what should be done when the Disputant request leaves and one of them is a Sunday or a public holiday. If the Disputant sends a note for sick leave, all days are continuously deducted from his sick leaves balance irrespective of whether the Disputant was on his day-off or it was a Sunday or a public holiday. On 26 October, the Disputant sent a doctor's note for sick leave from 26 October 2021 to 4 November 2021. The days-off was not deducted and 10 days was deducted from his balance of sick leaves. The Disputant requested leave in December, but this was refused. On one side the company is saying that it is overstaffed and on the other it cannot grant leave. The Disputant reiterates its prayers in his Statement of Case and prays accordingly.

THE EVIDENCE OF WITNESSES

The Disputant first called Mrs Stephanie Pierre, Senior Administration Officer at Air Mauritius Limited, as his witness. She notably stated that the Disputant's medical certificate dated 22 December 2020 (produced as Document A) was received by Air Mauritius. She also produced his balance of sick leaves for the months of December 2020 and January 2021 (Documents B and B₁). She was referred to the Minutes of the Rostering Meeting (Annex 7 to the Disputant's Statement of Case) whereby she read that '*A330/A340 04 captain down and 08 first officer down*' and '*A350 02 captain down*'. She also stated that Saturdays and Sundays are not deducted from sick leaves as well as public holidays. It is not the same for pilots, where even for Sundays or public holidays, the leave will be deducted. She was not questioned by Counsel for the Respondent.

Mrs Dameela Ramasawmy, Administrative Officer at Air Mauritius Limited, was the next witness called by the Disputant. She acknowledged receipt of a mail from the Disputant on 22 November 2018 (produced as Document C). She was aware that he sent a query which was handled by her boss. She explained, regarding the process for leaves, that it is on a planner to which the pilots have access, they apply and it comes to a system that they work on. She checks with her boss; he says to proceed and she informs. The query was addressed to her superior. She produced an email dated 6 February 2020 from herself (Document D). The reason the leave was not given was her Superior's decision and she cannot say why the Disputant did not get his leave.

She could not confirm that the Disputant requested for leave in January and that it was not given by her boss.

Mrs Ramasawmy moreover confirmed that on 9 September, the Disputant sent an email asking for *ad hoc* (annual) leave from 24 December to 6 January, to which she replied '*well noted, will confirm when roster will be done for December*'. She produced the email dated 9 September 2020 from Mr Jola (Document E). She also explained the process of requesting a day-off or leave. The request is made two months before; when sent, they work on it putting it on the system called '*Pilot plan*'. If there are any discrepancies or whatever, she calls the pilot to see what other alternative they have. When its finished, the planners take the system and work the roster till it is released. Confirmation of the leave depends on the planners; when they give it to her, she sends it on the same date. When the roster is released, then the pilot would know if he has got the off request or not. Regarding when the roster is released, she stated that this has to asked of the planners. She also produced the second page of the last email produced (Document E₁). She was not questioned by Counsel for the Respondent.

Mr Steve Carver, Pay Administration Manager at Air Mauritius Limited, was also called as a witness. He notably confirmed that under the previous Collective Agreement, prior to voluntary administration, pilots were due a 25% gratuity of their basic salary on the anniversary date of their contract. In July 2020, the Administrators signed a Collective Agreement with MALPA with the gratuity, for the first two years, to be paid at an interval of three months as from July 2020; then after two years, the gratuity will be paid on the anniversary date. The gratuity was due on 1 April 2020 and was not paid. It has been paid when the DOCA was approved. The gratuity was paid with a compromise of 50% as per the DOCA. The Disputant still has not been paid the missing 50%.

Mr Carver furthermore stated that the Pay Office did send an email stating that one has to be registered as a creditor. The email is from the Administrators who may have used the Pay Office for the email issues. The Pay Office has nothing to do with the registration of creditors; they only pay salaries and are not involved with creditors. His department did send a remittance about payment of salaries and administration. The payment is a summary of the details, which are in the payslip. The payslip was issued after two days; the remittance for payment of benefits due is dated 29 October 2021 (produced as Document F) from an email dated 30 October 2021. Mr Carver also produced an email from Mr Jola dated 26 March 2022 (Document G) addressed to him as well as the payslip attached thereto (Document G₁). In the email, Mr Jola is asking about details on payments done. All employees have been provided details of the summary they have

produced. He produced an email dated 30 March 2022 (Document H) together with its attachment detailing the payment made to the Disputant (Document H₁).

Mr Carver, on being shown the Disputant's payslips for March 2020 and April 2020, stated that the company was under administration when payment was issued for the end of April and they received instructions to pay only the basic salary. In June 2020, only the basic salary and ODA was paid. In July 2020, only the basic salary was paid. He confirmed that from April to July 2020, the Disputant was not paid as per the contract and Collective Agreement in force at that time. But when the DOCA was approved, the benefits have been readjusted. They have paid all the benefits as per the previous MoU till the end of June 2020. He is not aware of the amount. Mr Jola was refunded the readjusted Pilot Allowance.

Mr Carver was asked to obtain details of monthly payments due and paid. After having obtained same, he notably stated that net pay pre-administration amount credited to Mr Jola's account is Rs 216,207.52. The gratuity payment from 1 April 2019 to 22 April 2020 is Rs 522,770.18. The Pilot Allowance has been added. A document showing the benefits due to Mr Jola pre-administration was produced (Document J) as well as one for post-administration (Document K). The total amount paid pre-administration is only half of the total amount due. The post-administration period is from April 2020 to June 2020. For April to June, all benefits have been paid after the DOCA. For July to September, all the benefits were paid as per the revised Collective Agreement. The benefits paid after the DOCA have been included in Document K. On being shown the Disputant's July 2020 payslip, he stated that the payments were made subsequently. There was a new Collective Agreement in July 2020; they could not readjust the benefits in July but have done so for the other months. The benefits are included for the months of August 2020. The benefits due as per the new Collective Agreement were paid in October 2020.

Mr Carver moreover stated that the advance on the ODA has not been paid and they have not received any instructions to pay Mr Jola for the advance. He produced an email dated 14 October 2021 from the Pay Office (Document L) regarding registration as a creditor. He is aware of backpay due to pilots in the Collective Agreement of 2018. The backpay has not been paid and there is a clause that is subject to the company's financial situation. The witness also produced a bundle of the Disputant's payslips from March 2020 to November 2020 (Document M).

Mr Carver was questioned by Counsel for the Respondent. He notably stated that the payment of liabilities arising before April 2020 are subject to the DOCA, which would include any gratuity that would have become due prior to 22 April 2020. This would also include any backpay accrued since 2015. The DOCA has been adopted by the company creditors and he produced a copy of same dated 1 October 2021 (Document N). A list of creditors is annexed to the DOCA and Mr Jola was registered as one. He confirmed that all payments of liabilities arising on 22 April 2020 in respect of Mr Jola have been paid as per the DOCA. The Collective Agreement of 2018 was applicable for the period 23 April 2020 to 30 June 2020. All payments due to Mr Jola for this period have been paid by the Respondent. As per Annex 10 of the Disputant's Statement of Case, it is stated that no advance payment will be made for the ODA. There was no advance payment but payment was eventually made.

Mr Carver further stated that for the period from 1 July 2020, when the new Collective Agreement became effective, to now all payments due to Mr Jola have been paid according to his entitlements. The Respondent went into administration as it was insolvent. When certain payments ought to have been made to Mr Jola, only the basic salary was paid as the Respondent could not meet its payment obligations. Then all payments due were accounted for and eventually paid. The salary was adjusted in October 2020 with the new Collective Agreement. Payments when arising depends on the capacity to pay. He agreed that the Respondent made every effort to meet its payment obligations arising from 23 April 2020 to present. If there is any discrepancy, the Respondent would have no objection to review the situation.

Upon re-examination from Mr Jola, the witness notably stated that MALPA Employee Benefits Policy came into force on 1 September 2020, which is after the memo dated 8 May 2020 (at Annex 10 to the Disputant's Statement of Case) regarding the advance payment. Referring to the letter (Document L) regarding registration as a creditor, Mr Carver stated that he cannot say if Mr Jola would not have received anything if he were not registered. The letter states that if you are not registered as a creditor, you will not be paid the amount due. Mr Jola therefore had no choice.

Mrs Rumila Sandhya Devi Jootoo, Labour and Industrial Relations Officer, was also called to depose on behalf of the Disputant. She stated that on 25 May 2020, Mr Jola made representations to her office that he has not been paid his fixed allowances for the month of April 2020 and enquired about same in relation to the months of May and the coming months. On 6 January 2021, he made representations regarding being put on leave without pay instead of exhausting his paid leave first. On 7 January 2021, he made representations regarding the

computation of his end of year bonus, which was computed on his basic salary. He has also made a request to be refunded two days sick leave taken on 1 and 2 January 2021, which management agreed to. During the meeting on 21 January 2021, Mr Jola requested to be granted his local leave first, the half to which he is entitled before being put on leave without pay. Management stated that he was not defined as a worker and would not be granted same. In view of the stand of management, the matter was not pursued any further. She was not questioned by Counsel for the Respondent.

Mrs Sacheeta Devi Geddeegadoo, Chief Officer Administration, was also called by the Disputant. She confirmed that the Meal Allowance was changed to ODA during administration. The new allowance is issued according to a new table and is not same as the previous allowance. The policy for payment comes from management. Being referred to section 6 of Annex 15 of the Disputant's Statement of Case, she confirmed that the rates are the same although she has not received this paper. As per the allowance sheet shown to her, the estimated time of arrival is 8.35 and the estimated time of departure is 20.25. For the first 24 hours, he is supposed to get 100 euros. She was shown an email sent to her by one Geeta Heerah on 20 June 2020. All queries for Meal Allowance should be addressed to the Line Manager, who should contact her. When questioned by Counsel for the Respondent, she stated that she has not received any complaint about the calculations of the ODA nor is she aware if her office has received any complaints in relation to that. She confirmed that the table with the rates is what is applied on a daily basis to calculate the allowance.

Mrs Tanzila Aumjaud, Labour and Industrial Relations Officer at Bambous Labour Office, was also called as a witness by the Disputant. She stated that as per the *Workers' Rights Act*, when an employer intends to reduce its workforce either temporarily or permanently, the employer shall give written notice to the Redundancy Board together with a statement of reasons for the reduction in labour or closing down within at least 15 days before the employer intends to do so. The witness was not cross-examined.

The Disputant adduced evidence in relation to the present matter. He stated that he wished to re-state what has been stated in his Statement of Case. He works for the Respondent since 2008 and has never had any problems nor failed a test. He was a good employee. He produced a testimony dated 22 August 2022 (Document O) and one dated 16 August 2022 (Document O₁) to this effect. He tried his best to give everything for the company and has worked hard to be where he is now. He produced his contract of employment dated 4 December 2018 (Document P) which was for 10 years. The company went into administration and pilots agreed

to a decrease of more than 50% on salary. He produced his total emoluments for 2019 (Document Q) as well as his emoluments for the year ending June 2021 (Document R). He did not agree that the money, which he has worked for, was not paid. He was forced to register as a creditor in order to get 50% of his gratuity. He produced a bank statement of his account dated 26 July 2022 (Document S) showing the account to be in the negative.

Mr Jola moreover stated that they were presented with a contract. It was made clear by the terms of the offer that the offer is not being made to all pilots. This was a lie as the contract was offered to all the pilots. This was done to force them to sign the new contract. The contract came after the new Collective Agreement and contained terms such as the second clause which says that for the next 36 months, he can be sent on leave without pay for any time up to 18 months. He is not sure if he will be getting his salary as it is when the roster is out that he will learn if he is on leave without pay or not. Having already accepted a decrease in salary, he has used his savings and if he is on leave without pay, he does not know how he can provide for his family. His position of First Officer has been downgraded from Management B to C. He produced his roster from 14 December 2020 to 3 January 2021 (Document T) whereby the 1st and 2nd of January were not given as sick leave. A pay and benefits table from Emirates Airline was also produced (Document U) to show that pilots were never overpaid and that Mauritian pilots were being paid 40% less than the world benchmark.

Mr Jola furthermore stated that they were sent on leave without pay as there are too many pilots, which is not the case. He produced an email dated 14 July 2022 (Document V) to the effect that his leave requested was not approved. He has colleagues with over 100 days leave who were put on leave without pay instead of being given leave. The Respondent has unilaterally reduced the Meal Allowance and when he goes abroad, he does not have money to buy food. He produced the menu of the hotel (Document W) where he stayed in Paris showing the prices at the hotel. At the airport hotel, there is nothing around. This is in contradiction with an award of this Tribunal which says that this is part of their salary. No variation was applied or before the Tribunal nor did the Respondent try to negotiate with them. He cannot take anymore, prefers that he be fired and be paid what he is owed.

Mr Jola also stated that before pilots had access to the lounge. He was not aware that this was changed. He was told that he was not allowed in the lounge and it was not mentioned to him that the conditions are being changed. A new Collective Agreement has been signed and they cannot even respect same. His Meal Allowance was changed to ODA and even this is not being respected. He was paid less than what is written and his emails were not answered. The

Respondent could have applied for funds but did not do so. Although they have stated that they are insolvent, no proof of same was provided. Rs 9 billion was earmarked in the budget, but they waited 500 days to take this money. He has been confined for months and is not getting paid what he is due. He has agreed to the decrease in salary but he wants what is written in the contract.

He went on to state that after the signing of the Collective Agreement 2020, the Respondent came up with the MALPA Benefits and Policy document in September, two months after. Before all his terms of the conditions of work were in the Collective Agreement and his work contract; now this has been removed from the Collective Agreement and put in a Leave and Benefit Policy. This has put a new ticket policy, which was in the Collective Agreement and was like a *droit acquis*. The Employee Allowances and Benefit Policy dated 1 September 2020 is at Annex 15 of his Statement of Case. An email dated 27 June 2022 was produced (Document X). The salary has a *caractère alimentaire* and economic problems are not a reason not to pay salary. He cannot respect the procedures in the Procedure Agreement when they will not answer him. The Respondent is not respecting the Procedure Agreement which they imposed. A document on the method of computation of the Meal Allowance (Document Y) was produced. Pilots were initially governed by a Collective Agreement in 2011, it was amended in 2018 being backdated to 2015 and with the administration, there was a variation. It is not a new Collective Agreement but a variation of the Agreement. A clause which has not been varied in the old Collective Agreement is the award of the Tribunal (*RN 368/95*).

Mr Jola was questioned by Counsel for the Respondent. He notably stated that he has confirmed what he has stated in his Statement of Case to the best of his knowledge. He has made a mistake in saying that the Respondent's finances were in the red before the advent of Covid-19 at paragraph 24 of his Statement of Case. He could not give a conclusive opinion on the state of the finances of the company as there was no Auditor Report nor is he a financial person. He is aware that a company cannot trade when insolvent. In March 2020, there was a lockdown in the country and passenger flights were stopped, but not all flights. The country's borders were closed. These decisions were taken by the Government. When flights were effected, it was a decision of the Government's High Powered Committee.

Mr Jola stated that he is sure that with the border closures, the Respondent's revenue stream was significantly affected. He agreed that borders were not fully open from when administration started on 22 April 2020 to 1 October 2021. He agreed that when Mauritius went into lockdown, it was impossible to predict how the Covid-19 pandemic would evolve and the

situation was the same in April 2020. He did not agree that the Administrator was not involved in decision making as for as sanitary conditions were concerned. Most aviation companies around the world were affected with the pandemic. He could not answer on whether the Respondent had no control on the decision to start flights.

Regarding the Collective Agreement signed on 16 July 2020, Mr Jola stated that same does not supersede the previous Collective Agreement as it is a variation. Clause 3.1 of the new Collective Agreement is in contradiction to clause 2.3 of the same agreement. He agreed to what was stated in clause 3.1 stating that it also says '*otherwise*'. Clause 7 of same sets out the Leave and other Benefits which is applicable to both common and permanent contracts. He agreed that the Collective Agreement does mention an Employee Allowance and Benefit Policy. Annual leave is in that policy as is the same for the items set out in clause 7.

There is no provision in the Collective Agreement dealing with leave without pay except for clause 7 (e). There is no provision dealing with leave without pay in the Employee Allowance and Benefits Policy (at Annex 15 of his Statement of Case). His grievance is that he was forced to go on leave without pay from 1 January 2021 to 31 March 2021 and has not yet been required to go on leave without pay since. He could not say if it is not envisaged to require pilots to go on leave without pay at this stage nor in the foreseeable future. He was never made aware that he was refused paid leave because of the company's cash flow issues at the time. The only reason he can be refused paid leave is because of operation reasons as per the agreement.

In re-examination, Mr Jola stated that clause 2.3 of the new Collective Agreement states that the agreement is a variation of the agreement made on 1 October 2018. This section therefore supersedes clause 7.3. He was not aware about leave without pay and the agreement and is happy that the Respondent has made it clear that it is nowhere in the agreements.

Mr Geneshan Veerapen, HR Manager, was called to adduce evidence on behalf of the Respondent. He has been duly authorised to represent the Respondent and confirmed what has been stated in the Respondent's second Amended Statement of Case. The roster is now being published as per the pilots' service agreement, i.e., at least 15 days prior to the next roster period. It is similar as to how it was being done pre-Covid-19, they are now back to normal. He is not aware that Mr Jola made a request for paid leave to be granted prior to leave without pay. At the time, leaves were not being approved because of the cash flow problems. During the border closures, flights were curtailed to a minimum except for repatriation flights and to bring medical

supplies to Mauritius. This was about 10% of their operations pre-Covid-19. The airport was closed.

Mr Veerapen was thoroughly questioned by the Disputant. He notably stated that the roster is published well in advance and not as was being done during the Covid period. He is not aware when the August roster was published as he does not do same. He was only informed of when it was published. He cannot say how much is well in advance. Being referred to an email dated 11 December 2020 sent to one Samad Esoof (Annex 28, pages 3/4, of the Disputant's Statement of Case), he stated that he is not aware of same. He cannot answer, when Mr Jola applied for leave in 2018, whether there was a cash flow problem. He does not know when Mr Jola was informed of the leave without pay. Being shown an official report from the Disputant's log book on the number of hours the Disputant has flown, Mr Veerapen was not aware of same and stated that this was a not a document from the Respondent. Although pilots were working during confinement, he could not say if they were working more than before.

Mr Veerapen furthermore answered that from paragraphs 10, 11, 28 and 30 of the Respondent's Statement of Case, it is clear that the Respondent wanted to temporarily reduce its workforce. At paragraph 25 of same, it is stated that there would be an application to the Redundancy Board before any staff reduction. Being shown paragraph 10 of the letter of offer dated 5 August 2020 made to Mr Jola (Annex 18 of the Disputant's Statement of Case), he confirmed that Air Mauritius intended to reduce its workforce. He is not aware of the procedures to reduce the workforce as this was done during administration. He is not aware of any application made regarding Mr Jola to the Redundancy Board.

Mr Veerapen moreover agreed that it is the policy that before an employee goes on leave without pay, the company first tells him to exhaust his leave then take leave without pay. He is not aware that Mr Jola was sent on leave without pay while having paid leave. He could not comment on how leave without pay has been implemented on a fair and equitable basis. Not all pilots received the letter of offer and contract. It is not mentioned in the Benefit Policy and the Collective Agreement that leave without pay can be forced on pilots; it is only stated in the contract of offer. As per the Procedure Agreement 2020, the company agrees to comply with laws relating to employment relations and rights. The new Collective Agreement does not mention Overtime, Layover Allowance, Educational Allowance, Meal Allowance outstation, hotel accommodation and Disturbance Allowance at paragraph 3 (c) of the 2018 Collective Agreement.

Mr Veerapen also stated that page 8 of the Leave and Benefits Policy does not mention cash flow. He does not know the interpretation of 'unforeseen'. He agreed that it is written that leave requested may not be approved by the Head of Department on account of operation exigencies though it is not mentioned that this is the only reason. He agreed that it is written that half of the leave entitlement would be fixed by the employer and half by the employee. There are exigencies of service. An employee is allowed to fix half of his leaves if there are no exigencies of service, but it depends on the Line Manager to approve same or not. He agreed that for an employee sent on leave without pay there are no operational exigencies for him to be at work. An employee will be paid for his sick leave as long as his balance has not been consumed. He was not aware that the Disputant's sick leaves for 1 and 2 January 2021 were not granted.

Mr Veerapen was referred to an award of this Tribunal (*RN 368*) between MALPA and the Respondent. He agreed that the award is on Meal Allowance and hotel accommodation. He was also referred to article 2 of the Procedure Agreement and agreed that changing the Meal Allowance has an impact on the employee's conditions of work. During the Covid period, pilots had to go to isolate in a hotel. The letter of offer dated 5 August 2020 (at Annex 18 to the Disputant's Statement of Case) states that it reflects the conditions in the agreement made with the Union. He agreed that pilots have accepted a reduction of more than 50% in their emoluments and despite this they were still sent on leave without pay.

THE SUBMISSIONS OF THE PARTIES

The Disputant first submitted in relation to the first limb of the Terms of Reference of the dispute. He was on put on leave without pay from 1 January 2021 to 31 January 2021 in clear breach of the *Workers' Rights Act*. No company is allowed to reduce its workforce for economic reason without applying to the Redundancy Board. The Respondent has temporarily reduced its staff costs by temporarily reducing its workforce. This is admitted in the Respondent's Statement of Case. The leave without pay clause in the contract was meant to go around the applicable law. Reference was made to an order of the Redundancy Board in *Jeewonarian & Ors and Health Contact Centre Ltd. (RB/RN/172/2020)*, whereby it was notably stated that the provisions of *section 225 (3) of the Insolvency Act 2009* do not override the provisions of the *Workers' Rights Act*.

The Disputant submitted that he was misled into signing the new contract of employment, which contained the leave without pay clause, as he was made to understand that

same was not being made available to all pilots and that the terms of the letter of offer were in alignment with the variation of the Collective Agreement signed in July 2020. The letter of offer allows the Respondent to impose 18 months leave without pay to all pilots over a period of three years. Signing the new contract does not mean that he has willingly accepted the changes which were unilaterally imposed. The new contract of employment is illegal being in breach of the law and the principles of good employment relations. It has no *raison d'être*, must be null and void and should not be enforced. The leave without pay clause in the contract was meant to temporarily reduce the workforce with respecting the procedure.

In relation to the issue of paid leave as per the second limb of the Terms of Reference, the Disputant notably submitted that the MALPA Employee Allowance and Benefit Policy (Annex 15 of the Disputant's Statement of Case) is based on the *Workers' Rights Act*. He requested paid leave in January 2020 and was instead put on leave without pay without any reason. Reference was made to the provisions on leave entitlement found in the policy. The refusal of paid leave is in breach of the Collective Agreement and the policy. The Respondent must set up a system that will allow him to take at least half of his yearly entitlement when needed and approved well in advance.

The Disputant moreover submitted on non-payment of salary due as per the fourth limb of his Terms of Reference. Referring to *Dr D. Fok Kan, Introduction au droit du Travail*, salary is defined as everything that is quantifiable and paid to the employee. His basic salary and his allowances, which are clearly listed in the Collective Agreement and work contract, has a *caractère obligatoire*. The Respondent has admitted to the non-payment of salary due at paragraphs 21 and 22 of their Statement of Case. Mr Carver confirmed that only 50% of his gratuity was paid and that other items were not paid when due and some were paid six months later. The Respondent is liable for payment of wages and salary accrued under a contract of employment.

The Subsistence and Travelling Allowance as per paragraph 5 (e) of his work contract has unilaterally stopped being paid since 22 April 2020 and has not been reinstated nor refunded. Traveling Allowance has been modified and is now called ODA. Education Allowance has also not been paid since 22 April 2020. Flight Duty Allowance as per paragraph 5 (d) of his work contract was not paid as from April 2020 to November 2020. The full amount of his gratuity has not been paid as per the Collective Agreement in force at the time. Although Mr Carver has stated that 50% of the gratuity was paid as per the DOCA, the matter is governed by the employment contract not the DOCA. Retention Allowance has not been paid since 27 April 2020. Backpay, as

stated in the Collective Agreement dated 1 October 2019, has been completely ignored by the Respondent and not to be found in the DOCA. Backpay from 2015 to 2018 is due and the Respondent has no right to unilaterally write-off this. Advanced payment of the Overseas Allowance mentioned in the Benefits Policy has never been paid.

It has also been submitted that an award (at Annex 11 of his Statement of Case) of this Tribunal (*RN 369 of 1995*) was not respected and ignored. As per the award, the Meal Allowance cannot be unilaterally modified. Changes in circumstances do not warrant unilateral changes to terms and conditions of an employee. Reference was also made to another award between *Air Mauritius Cabin Crew Association and Air Mauritius Ltd (RN 394 of 1983)*. Meal Allowance was quantifiable, paid and is a defining part of the salary, which cannot be unilaterally modified. The Respondent was wrong to pay only 50% of his salary due and accrued under the work contract. The administration never terminated his employment and his full salary remained due all the time. It is not written that the Administrator has the right not to pay the full salary or to modify terms and conditions of employment. The only power of the Administrator was to terminate the employee's contract and if he so decides, he should apply to the Redundancy Board.

In relation to the third limb of the Terms of Reference of the dispute, the Disputant referred to the case of *State Bank of Mauritius Ltd v Jagessur [2008 SCJ 8]* on the matter of Collective Agreements and has also referred to Dr D. Fok Kan. The terms and conditions of employment for members of MALPA were governed by the Collective Agreement dated 1 April 2011 with amendments agreed upon on 1 October 2018 and a variation entered on 16 July 2020. Items not mentioned in the variation of the Collective Agreement have therefore not been varied and remain in full force as per the Collective Agreement of 2011 or 2018. These are Overtime, Lay Over Allowance, Education Allowance, Meal Allowance now named ODA, hotel accommodation and Disturbance Allowance. The company is not respecting these items and is also in breach of the new Procedure Agreement. The leave without pay clause is also an addition. Days spent in quarantine should be considered as working days. He did not have his liberty when in quarantine and it cannot be counted as a day-off. As per the Collective Agreement, the employer undertakes to comply with all the laws of Mauritius. Sundays and public holidays, whether on sick leave or on annual leave, are currently being deducted in breach of the *Public Holidays Act*, which should be respected by the Collective Agreement.

The Disputant also submitted that his Collective Agreement is valid for 4 years as from 1 April 2015 to March 2019. He was denied lounge access on 30 June, which is after the date the present dispute was filed. It is to be found in the MALPA Employee Benefits Policy. *Section 58* of

the Act provides that only a substantial chance in circumstances can allow the variation of a Collective Agreement. The Respondent is acting in clear breach of the Collective Agreement and against the principles and best practices of employment relations. The Respondent claims inability to pay, but the company is overstaffed. The Respondent has no right to say that it is overstaffed with pilots. The Respondent has never adduced any proof to confirm its state of affairs. He has been working more because of cargo and repatriation flights. Having accepted a reduction of 50% in salary, it is fair to ask more from him? He has not been paid what he was due as per his contract and Collective Agreement, had to forego two Collective Agreements with the variation in July 2020 and a contract was forced on him. He submitted that the Tribunal should award in his favour.

Learned Counsel for the Respondent, in his submissions, first drew the Tribunal's attention to the bank statement produced by the Disputant (Document S), whereby money was credited to the account. For the Disputant to talk about hardship when he still has a job is disrespectful. Although we have heard how difficult it has been for the Disputant, little has been heard how it has been very difficult for the company. The relevant context in the present matter is that of the Covid-19 pandemic. It was admitted in Mr Carver's cross-examination that the issues resolved around the Respondent's ability to pay. It could not be predicted how the pandemic would evolve and the Disputant admitted to same. The cause is not economic downturn but something the company had no control on.

Counsel went on to submit that the pandemic and the closing of borders was a *force majeure* and the closure was not a decision of the Respondent but that of the Mauritian government. Counsel referred to the case of *Espitalier Noel Ltd v Serret* [1980 MR 279] on the issue of *force majeure*. The Privy Council has identified the conditions to establish *force majeure* in *General Construction Limited v Chue Wing & Co Ltd and anor.* [2011 PRV 73]. Counsel also put in a judgment of the *Cour d'Appel de Paris (Arrêt du 26 Mars 2021 (n^o 107))* on *force majeure* in the aviation sector. When *force majeure* is present, all obligations, contractual or legal, are suspended. Counsel therefore invited the Tribunal to make a finding of *force majeure*.

Counsel also submitted that the Disputant was not in a position to challenge the economic reality as he admitted not being a financial person. The Administrator has a broader role in salvaging the business in the interests of creditors, employees and shareholders. Regarding the first Terms of Reference, the question is whether the Respondent ought to have gone before the Redundancy Board? This item is not a labour dispute as per the definition of a labour dispute and the Tribunal will have no jurisdiction to enquire into the same. Nor can the Tribunal decide what

would be within the scope of the Redundancy Board, which would be a matter under the *Workers' Rights Act*. The issue of the Disputant being on leave without pay arose from January to March 2021 and he is not currently on leave without pay. It is not the role of the Tribunal to make a declaration after the event, referring to the award in *Johar and Cargo handling Corporation Ltd (ERT/RN 93/12)*. The issue is no longer live. Counsel also put in the Supreme Court judgment of *Marion v The Minister of Health and Wellness & anor. [2021 SCJ 319]* on the issue of academic judgments.

In relation to the second Terms of Reference on refusal of paid leave, the issue is academic and is no longer live. Whether the Disputant will be refused paid leave in the future is hypothetical for the Tribunal to be involved with. The case for the Disputant is that he was entitled to fix at least half of his leaves without having regard to the full picture. Regarding the third Terms of Reference, Counsel notably reiterated the point of *force majeure* as even if the Tribunal found that there was a breach, the Respondent would be excused on account of this. A number of matters have been heard for the first time in submissions and were not brought in evidence. Mr Carver was the Disputant's witness and the latter is bound by his evidence. One also has to know which Collective Agreement was in force? As per the variation of the Collective Agreement 2020, clause 3.1 states that the agreement constitutes the entire Collective Agreement between the parties and replaces all previous Collective Agreements signed. Despite being a variation, its scope is not limited.

On the issue of the Disputant's basic gratuity of 25%, it was submitted that Mr Carver stated that all payments due to Mr Jola have been made prior and until administration being dealt with under the DOCA. The Disputant, being a creditor, is bound by the DOCA as per *section 265 of the Insolvency Act*. Mr Carver also stated that all payments towards the Disputant have been met for the period 23 April 2020 to 30 June 2020. Some payments may have not been paid when due, but they were eventually paid. There is therefore no live issue. As for Meal Allowance, with the signing of the variation of the Collective Agreement in 2020, there is no contractual basis for same. The ruling relied upon by the Disputant dates to 1995 and the issue has now arisen in 2020. The allowance is now known as ODA. The principle is the same but the issue is one of quantum. The Respondent has to look at what is fair having regard to the costs and it cannot be taken to increase the pay packet. It is therefore not a breach of the Collective Agreements as it is not to be found in the same.

Counsel also submitted on the individual contract, which was not unilateral as it was signed by the Disputant, who even had the opportunity of returning it. The contract and therefore

the leave without pay clause contained therein does not constitute a breach of the terms and conditions of the Collective Agreement. Moreover, at this point in time the Disputant has accepted that he is not on leave without pay. In relation to the fourth Terms of Reference on non-payment of salary, Counsel has no difficulties with the Disputant's interpretation salary to mean all emoluments. However, these should have been particularised in his Statement of Case and as per Mr Carver, payments have been made. There is no live issue as to non-payment of salary. Counsel also gave his view on the Disputant's prayers as per his Statement of Case with regard to the Terms of Reference of the dispute.

The Disputant made a reply to the submissions offered by Counsel for the Respondent. He notably stated that the Respondent failed to apply for financial aid; that he is disputing the leave without pay clause; that leave cannot depend on the Respondent's ability to pay; that the variation should clearly mention every term; that he was forced to register as a creditor as he would be paid nothing; and that he accepted the new contract out of *contrainte*.

THE MERITS OF THE DISPUTE

The Disputant, in the present matter, has brought a dispute on four limbs against the Respondent. The first limb states that his employer wants to send him on leave without pay, after having accepted a salary decrease of more than 50%, without going through the Redundancy Board.

The Disputant has related that he was offered a new contract of employment after the variation of the Collective Agreement was signed in July 2020. The contract of employment contained a leave without pay clause. Having been put on leave without pay from 1 January 2021 to 31 March 2021, he contends that this is in breach of the *Workers' Rights Act* and amounts to the Respondent temporarily reducing its workforce. The leave without pay clause is also not to be found in the variation of the Collective Agreement. The clause allows the Respondent to impose 18 months leave without pay over a period of 3 years.

It is the Disputant's contention that the Respondent should have made an application before the Redundancy Board before sending him on leave without pay. He has asserted that sending him on leave without pay amounts to temporary redundancy. The Disputant has notably relied on a decision of the Redundancy Board in *Jeewoonarain & Ors and Health Contact Centre*

Ltd (supra), whereby it was held that being in administration does not absolve the Administrator from respecting the relevant provisions of the *Workers' Rights Act* regarding redundancy.

It is trite law that the Tribunal's jurisdiction stems from the provisions of the *Act* and that it is meant to arbitrate on labour disputes as defined under the *Act*. Indeed, *section 2* of the *Act* defines a labour dispute as follows:

"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) *.....*
- (b) *does not, notwithstanding any other enactment, include a dispute by a worker made as a result of the exercise by him of an option to be governed by the recommendations made in a report of the Pay Research Bureau or a salary commission, by whatever name called, in relation to remuneration or allowances of any kind;*
- (c) *does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute;*

The first limb of the Terms of Reference as worded notably avers that the employer wishes to send the Disputant on leave without pay ... without having gone to the Redundancy Board. As formulated, the terms are more in the manner of a declaration leading to imply that the employer should have applied to the Redundancy Board prior to sending the Disputant on leave without pay. It is more concerned with the procedure that the Respondent must adopt when putting the Disputant on leave without pay and does not relate to a specific item of the definition of a labour dispute, i.e., wages, terms and conditions of employment, promotion, etc.

This aspect of the Terms of Reference would not therefore amount to a labour dispute as defined under the *Act* and would not be within the jurisdiction of the Tribunal.

Despite the Disputant contending that the Respondent is breach of its obligations under the provisions of the *Workers' Rights Act*, the Tribunal does not have jurisdiction under matters arising under this particular enactment in relation to redundancy. It is trite law that the Industrial Court has exclusive jurisdiction of matters falling under the *Workers' Rights Act*. Moreover, matters of redundancy are dealt exclusively by the Redundancy Board, which has been set up pursuant to the specific provisions of the *Workers' Rights Act*, to cater for such cases.

The Tribunal has also noted that the Disputant has, in submissions, lengthily contested the contract of employment he entered into which he considers to be null and void for the various reasons he has put forward. It must however be noted that the issue of whether the Disputant's contract of employment is valid or not does not form part of the Terms of Reference of the dispute and it would be *ultra vires* for the Tribunal to enquire into same. Indeed, the following may be noted from what the Supreme Court stated in *Air Mauritius Ltd v Employment Relations Tribunal* [2016 SCJ 103]:

Under section 70 (1) the Tribunal is required to enquire into the substance of the dispute that is referred to it and to make an award thereon and it is not empowered to enquire into any new matter that is not within the terms of reference of the dispute.

In relation to the second Terms of Reference, it has been stated that the employer is refusing the Disputant paid leave without any reasonable cause. As per the evidence on record, the Disputant applied for *ad hoc* (annual) leave by email dated 9 September 2020 (Document E) from 24 December 2020 to 6 January 2021. The process of applying for leave was explained by the Disputant's witness, Mrs D. Ramasawmy in her evidence. The Disputant was informed that his leave would be granted depending on account of operational exigencies but was put on leave without pay for the same period.

It has been borne out during the course of the hearing that annual leave is governed by the MALPA Employee Allowance and Benefits Policy (Annex 15 to the Disputant's Statement of Case). This notably provides for a yearly entitlement of 32 days of annual leave. The policy also states that the leave requested may not be approved by the Head of Department on account of operational exigencies.

In the same vein, the Disputant has also contended that the Respondent refused him sick leave on 1st and 2nd of January 2021 despite being certified sick by a doctor from 23 December to 2 January. He has produced his roster for the period 14 December 2020 to 3 January 2021 (Document T) to show that these two aforementioned days were not given as sick leave. However, as per the evidence of the Labour and Industrial Officer, Mrs Jootoo, the Respondent agreed to the refund of the two days of sick leave. This is moreover confirmed by an email dated 10 February 2021 from the aforesaid witness at Annex 25 of the Disputant's Statement of Case.

It is apposite to note that the annual leave applied for and the sick leave not granted are matters which have happened in the past and are no longer live issues. Moreover, the issue of sick leave has been resolved as per the evidence on record. The Tribunal is therefore being asked to give a declaration on whether the employer refused the Disputant paid leave without any reasonable cause. The Tribunal has in the past cautioned against the making of declaratory awards in relation to disputes referred to it as can be gathered from what was stated in *Cheddy and Ministry of Labour, Industrial Relations, Employment and Training (ERT/RN 120/15)* in relation to declaratory awards:

The Tribunal has on numerous occasions highlighted that it does not generally give declaratory awards (vide Mr Ugadiran Mooneepen and Mauritius Institute of Training and Development, ERT/RN 35/12 and Mr Abdool Rashid Johar and Cargo Handling Corporation Ltd ERT/RN 93/12).

Moreover, the following may be noted from what the Tribunal stated in *Mooneepen and Mauritius Institute of Training and Development (ERT/RN 35/12)*:

*The Tribunal is being merely asked to give a declaratory award on whether the Respondent should have proceeded with the interview or not. We quote here what was held in **Planche v. The PSC & Anor [SCJ 128 of 1993]**: -*

*"It seems to us that this application is incompetent if only for the reason that the question in issue is now purely an academic one. We can do no better than echo the dictum of Lord Justice Clerk Thomson in *McNaughton v McNaughton's Trs, (1953) SC 387, 392*: -*

"Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions,

and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau.”

It should be noted that a distinction is now drawn between hypothetical and academic questions (*vide Hemascia Ltd v Independent Review Panel [2022 SCJ 400]*).

The matter of the paid leave applied for pertained to the period between 24 December 2020 to 6 January 2021. It would therefore be academic for the Tribunal to pronounce itself on same as the period for which leave was applied has now passed. It would not serve any practical purpose. The Tribunal would thus be embarking on an academic exercise in determining whether the Disputant should have been granted annual leave as aforementioned with the issue no longer being live. In view of the academic and declaratory nature of this particular limb of the Terms of Reference, the Tribunal shall not enquire any further into same.

Regarding the third limb of the Terms of Reference, the Tribunal is being asked to look into non-respect of terms and conditions of Collective Agreements. The Disputant contends that he, as a member of MALPA, was governed by the Collective Agreement dated 1 April 2011, an amended Collective Agreement dated 1 October 2018 and a variation of the Collective Agreement dated 16 July 2020. It is his claim that items which are not mentioned in the variation of 2020 still prevail as per the previous Collective Agreements of 2011 and 2018. He has listed these items to be Overtime, Layover Allowance, Education Allowance, Meal Allowance (now known as ODA), hotel accommodation and Disturbance Allowance. The Disputant therefore wishes that these items be respected by the Respondent.

In relation to this pertinent issue, it is incumbent on the Tribunal to determine which particular Collective Agreement applies as has been rightly submitted by Counsel for the Respondent. It has not been denied that the variation of the Collective Agreement (Annex 13 to the Disputant’s Statement of Case) was most recently signed in July 2020. The preamble of the variation notably states the following at clause 2.1:

2.1 This document embodies the existing fundamental conditions of service of the existing categories of employees of Air Mauritius Ltd and is based on existing agreements, award, regulations, reports of commissions on salaries as well as practices in force in this company governing this category of employees.

Moreover, the 2020 variation has, at clause 3.1, notably provided:

3.1 This Collective Agreement (together with its annexures) is a mutually agreed variation of existing collective agreements between the Parties. It constitutes the entire Collective Agreement between the Parties and supersedes and replaces all previous collective agreements signed between the two parties.

(The emphasis is ours.)

In carefully considering the wordings of clause 3.1, it is clear that the variation of 2020 has a very wide scope inasmuch as it supersedes and replaces all previous Collective Agreements. The variation of the Collective Agreement of 2020 would therefore take precedence over the Collective Agreements signed in 2011 and 2018 between MALPA and Air Mauritius Ltd. It must be noted that the Disputant, as per paragraph 7 of his Statement of Case, is not seeking to challenge the terms and conditions of the Collective Agreement of 2020. The various items, as listed by the Disputant, which emanate from the previous Collective Agreements of 2011 and 2018 are therefore no longer in existence as per the new agreement of 2020.

It is also important to note that the various items enunciated by the Disputant, save for Meal Allowance, have not been particularised in his Statement of Case and the Respondent has not had an opportunity to reply to same. These items are also not particularised in the Terms of Reference of the present dispute. It would thus be unfair for the Tribunal to pronounce itself in relation to these items.

Regarding Meal Allowance, it has notably been contended that this has been modified to ODA despite an award (*RN 368*) of this Tribunal in 1995 between MALPA and Air Mauritius Ltd. A perusal of this award (at Annex 11 of the Disputant's Statement of Case) particularly reveals that the Tribunal awarded that the Respondent should as from 1 December 1994 introduce a method of calculation of meal allowances on the basis of the ancient formula favoured by MALPA. The Tribunal did not award a specific method of calculation of Meal Allowance *per se* but had placed the onus on the Respondent to introduce same.

It should also be noted that the award was delivered on 17 November 1995 and was heard pursuant to the now repealed *Industrial Relations Act 1973*. Under the provisions of this particular enactment, an award shall be binding on the parties to whom the award applied for a

period not exceeding two years (*vide section 85 (1)(c) of the Industrial Relations Act 1973*). The aforesaid award of the Tribunal cannot therefore be said to be of any effect as at present.

It should also be noted that Meal Allowance does not form part of the variation of the Collective Agreement of 2020 and as per the Disputant himself, this is now called ODA. The variation does however provide for Meal Allowances for ATR at Clause 5.6, but this does not appear to concern the Disputant.

The Disputant has also raised the issue of lounge access in his evidence as being no longer accessible to pilots. It should be noted that this particular issue has not been specified in the Terms of Reference of the dispute nor in the Disputant's Statement of Case. This issue has taken the Respondent by surprise in not having had an opportunity to put forward its views on same and it would thus be unfair for the Tribunal to consider same.

The issue of leave without pay has also been raised by the Disputant under this limb of the Terms of Reference of the dispute. It should however be noted that the leave without pay clause is to be found in the Disputant's contract of employment and not in the Collective Agreements of 2011 and 2018 that he relies upon. Moreover, it has not been disputed that variation of the Collective Agreement of 2020 does not make mention of leave without pay. The issue of leave without pay therefore cannot fall within the ambit of the third limb of the Terms of Reference relating to non-respect of terms and conditions of Collective Agreements.

Under the fourth limb of the Terms of Reference regarding non-payment of salary due, the Disputant has, in his submissions, listed his gratuity payment, of which only 50 % was paid; Subsistence and Travelling Allowance; Meal Allowance; Education Allowance; Flight Duty Allowance; Retention Allowance; backpay from the Collective Agreement of 2019; and advanced payment of the Overseas Allowance as mentioned in the Benefits Policy. It should be noted that the Respondent had no qualms with the Disputant's notion of salary to mean all emoluments.

As previously noted, the Disputant is now governed by the variation of the Collective Agreement of 2020 and the contract of employment he was offered thereafter. Whatever allowances which may have existed in the 2011 and 2018 Collective Agreement have been superseded and replaced by the terms and conditions of the variation of 2020. The variation of 2020 only mentions Flight Duty Allowance, Instructor's Pilot Allowance, Responsibility Allowance,

Transport Allowance, Meal Allowances – ATR, Common Contract Allowance and End of Yearly Entitlement Contract Gratuity under clauses 5 and 6 of same. The items which the Disputant has listed and which emanate from the previous Collective Agreements are therefore no longer in existence as per the terms of the variation signed in July 2020 as has been previously noted.

It is also important to consider the evidence of the Disputant's witness, the Pay and Administration Manager Mr Carver. According to Mr Carver, the gratuity has been paid according to the DOCA with a 50% compromise. An email dated 30 March 2022 (Document H) was moreover produced by Mr Carver together with an attachment detailing the payments made to the Disputant (Document H₁). Mr Carver also stated that between April 2020 and July 2020, the Disputant was not paid as per the contract and Collective Agreement in force at the time. With the approval of the DOCA, the benefits were readjusted and the Disputant was paid all the benefits under the previous agreement to the end of June 2020. The amount paid pre-administration is only half of the amount due. From July 2020 to September 2020, all benefits were paid as per the revised Collective Agreement.

Mr Carver also produced a document (Document K) showing the benefits paid to the Disputant after the DOCA. This document notably shows the breakdown of the gratuity payment made to the Disputant as well as the other payments made to him post-administration. Another document (Document J) on pre-administration payments to the Disputant show that a gratuity payment of half of Rs 522,770.18 for the period 1 April 2019 to 22 April 2020 was made as per the DOCA. Mr Carver also stated that they have not received any instructions to pay Disputant the advance on ODA but conceded that payment of same was eventually made when cross-examined. He is aware of the backpay issue, which according to the Collective Agreement of 2018 is subject to the company's financial situation. Mr Carver moreover confirmed that all payments due to Mr Jola have been paid for the period 23 April 2020 to 30 June 2020.

The Tribunal would once more wish to highlight that the various items put forward by the Disputant, save for gratuity and Meal Allowance, have not been particularised in the Disputant's Statement of Case. It would thus be unfair for the Tribunal to pronounce itself on these items individually despite having noted the tenor of Mr Carver's evidence.

The issue of Meal Allowance, including the Tribunal's award in 1995, has already been considered under the third limb of the Terms of Reference of the dispute, where the Tribunal notably found that same does not exist under the variation of the Collective Agreement signed

in July 2020. They can therefore be no issue of payment of Meal Allowance under the variation of the Collective Agreement signed in July 2020.

Regarding the issue of gratuity, Mr Carver did clearly state that this was paid with a 50% compromise as per the DOCA as evidenced by Document J. Payment of gratuity has also been made after the DOCA as per Document K. The Disputant, having been registered as a creditor, is bound by the DOCA.

The Tribunal has noted that the Disputant has included several prayers in his Statement of Case. It is apposite to note that the Tribunal is empowered to enquire into the dispute in accordance with the Terms of Reference of the dispute referred to it and cannot therefore enquire into matters which are not within the Terms of Reference of the dispute. It has been noted that the prayers (at paragraph 150 of the Disputant's Statement of Case) contain matters which are not in accordance with the Terms of Reference and the Tribunal thus cannot pronounce itself on same.

In view of the above and after having enquired into the four limbs of present dispute, the Tribunal cannot find that the Disputant should be favourably awarded as per the Terms of Reference of the dispute of the matter.

The dispute is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

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SD Raffick Hossenbaccus
(Member)

.....
SD Rabin Gungoo
(Member)

.....
SD Yves Christian Fanchette
(Member)

Date: 12th April 2023