

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

RN 1021

Before:

Indiren Sivaramen	- Vice-President
Bulram Tacouri	- Member
Marie Pierre Jacques Henri de Marassé- Enouf	- Member
Hurryjeet Sooreea	- Member

In the matter of:-

Airline Employees Association (Applicant)

And

Air Mauritius Ltd (Respondent)

The points in dispute in the present matter are:-

1. *“Whether Management of Air Mauritius Ltd is justified in imposing a fuel surcharge on air tickets issued free of charge to members of the union or otherwise.*
2. *Whether Management of Air Mauritius Ltd should stop forthwith imposing the above fuel surcharge or otherwise.*
3. *Whether Management of Air Mauritius Ltd should refund fuel surcharge claimed from members of the Airline Employees Association (AEA) on air tickets issued free of charge with effect from January 2004 or otherwise.”*

This matter has been referred by the Minister of Labour, Industrial Relations and Employment in virtue of Section 82(1)(f) of the then Industrial Relations Act 1973, as amended. The Employment Relations Act 2008 now makes provision for such a matter to be heard before the Employment Relations Tribunal. Section 108(10) of the Employment Relations Act provides as follows:

"108. Transitional provisions

(10) Any proceedings pending immediately before the commencement of this Act before the Permanent Arbitration Tribunal and the Civil Service Arbitration Tribunal shall be deemed to be proceedings pending under this Act and may be proceeded with before the Tribunal”.

This division of the Tribunal heard the parties in the present matter and the Applicant was represented by Mr A. J Meiring assisted by Mr M.Sauzier, Counsel instructed by Mr J.Gujadhur, Attorney-at-Law whereas the Respondent was represented by Mr R Deenanuth, Vice-President, Sales and Distribution assisted by Mr Y.Mohamed SC.

Mr Meiring deponed before the Tribunal and he stated that he is the President of the Airline Employees Association (AEA). He added that the Respondent and the Applicant have entered into numerous Memorandum of Understanding and agreements. Most of the expatriate pilots are members of the Applicant. He then referred to the Memorandum of Understanding (MOU) annexed as Annex 1 to the Statement of Reply of the Respondent, and reference was made particularly to paragraph 1(d) in the preamble at page 1, paragraph 1(e) at page 2 and paragraph 4 in relation to 'Concessional Travelling Privileges' at page 8 and Annex 5 to the MOU. He also referred to Annex 2 to the Statement of Reply of the Respondent, that is, the MOU in relation to conditions of employment for the expatriate technical crew. He referred specifically to paragraph B4 in the said document in relation to 'Concessional Travel Privileges'. He then accepted that completely at the end of paragraph B4, it is provided that "Irrespective of the other provisions of this Agreement, more particularly with regards to the duration of the MOU, Air Mauritius reserves the right to amend or withdraw this travel privilege at any time."

Mr Meiring stated that a 'fuel surcharge' is a charge that a company imposes on a ticket to make up for the deficit caused by fuel price but he averred that this can be imposed on passenger tickets and not on free tickets which have to be free from any charge (apart from Government tax). He stated that the fuel surcharge has been imposed since January 2004 on all pilots who are members of the Applicant without any discussion or compromise. The quantum of the surcharge has been changed on numerous occasions and it is at a rate of 14 to 20% today compared to a rate of 21% when it was first introduced. He averred that as a pilot of Air Mauritius he is entitled to a free of charge ticket but he is being required to pay a fuel surcharge, and a pilot of another airline which would have a 'Code/Share' agreement with Air Mauritius is also entitled to free of charge tickets except that in the case of the other pilot, the latter would not be subject to fuel surcharge. He averred that the entitlement of members of the Applicant to 'free of charge' tickets has not been respected by Air Mauritius since the year 2004 and he prayed for an award in terms of the prayers as per the three points in dispute.

In cross-examination, he averred that he does not know why the fuel surcharge was imposed by Air Mauritius. He averred that he did write to Air Mauritius to ask why this was being imposed but did not receive any reply. However, he could not show any document to that effect and candidly stated that it was not necessary to mention this in the Statement of Case of the Applicant or to annex relevant correspondences between the Applicant and the Respondent in the Statement of Case. The refund sought as from the year 2004 would, according to him, cost about between 8000 to 10,000 Euros per pilot and there are 148 pilots who are members of the Applicant. He stated that all the members of the Applicant signed the option forms thus accepting the terms and conditions mentioned in the MOU (Annex 1 to the Statement of Reply of the Respondent). A copy of the option form signed by Mr Meiring was identified by him and produced and marked Doc A. It is in the same form as option forms signed by the other members of the Applicant. He stated that privilege means entitlement. He agreed that even in the document 'Annex 2 – MOU Conditions of Employment', the concessional travel is

mentioned as a privilege. He stated that the provision in relation to pilots who had attained the age of 60 will apply to some of the members of the Applicant and that the contents of 'Annex 2' were arrived at after negotiations between the Applicant and the Respondent. He was aware of the paragraph at page 11 of the document which reads as follows:

"Irrespective of the other provisions of this Agreement, more particularly with regards to the Duration of the MOU, Air Mauritius reserves the right to amend or withdraw this travel privilege at any time.", and he did not object to same. He agreed that this right of the Respondent to amend or withdraw this travel privilege is mentioned on numerous occasions in Annex 2. He stated that during the years concerned there was a fluctuation in fuel price. He did not agree that Air Mauritius would not have been competitive if it had not imposed the surcharge on passengers and the pilots. According to him, a surcharge on passenger tickets is valid but applying a surcharge on employees' tickets is not warranted and is not done in the airline industry.

Mr R Deenanuth then deponed on behalf of the Respondent. He stated that on average the Respondent collects around Rs 40M to Rs 45M per year as surcharge on air tickets of pilots and other employees. The total amount as from the year 2004 would thus be around Rs 250M. If the pilots are refunded, the other employees will also have to be refunded and this would cause a big dent in the finances of the Respondent. He stated that if the Respondent had not imposed this surcharge, it would have been in a very bad financial situation the more so that the surcharge imposed covers only part of the increase in fuel price. The price of fuel varied, according to him, from USD 80 to above USD 100 a barrel. In any event, there are guidelines from the International Air Transport Association (IATA), and the Respondent follows these guidelines in relation to the surcharges which can be imposed.

In cross-examination, he stated that he had no idea of the quantum of losses incurred by the Respondent following fuel hedging. According to him, a surcharge would be a fee. The fuel surcharge was imposed by Air Mauritius. At the time the surcharge was introduced the price of one barrel of petrol was beyond 100 USD and now the price is at 80 USD. There have been some twenty revisions of the rate of the fuel surcharge imposed based on price fluctuations. Mr Deenanuth was referred to pilots of other airlines and he stated that there is a 'ZED' agreement which is an agreement in the airline industry whereby there is no payment of the fuel surcharge. It is a reciprocal agreement between two airline companies and the agreement covers only "privilege travel, personal travel." He was asked if he could make available relevant IATA guidelines to the Tribunal and after some time was given to him, he stated that he had not been able to trace these. He explained that under the concession agreement, the 'ZED' agreement can be used only for flights in sectors not operated by Air Mauritius. The pilots of the Respondent must travel with the Respondent (and thus use their free tickets on Air Mauritius) along routes operated by the Respondent.

Mr Mohamed then submitted that a right cannot be a privilege and that a privilege cannot be claimed as a right. He referred to **Salmond on Jurisprudence, 11th edition, pages 262 to 273**. He argued that a pilot cannot be said to be the owner of that interest to a privilege of having a free ticket. There is, according to him, no legal duty on Air Mauritius to give the pilots free tickets and it is only a privilege. He stated all the allowances mentioned in the MOU (Annex 1 to the Statement of Reply of the Respondent) are rights and the parties are bound by them.

However, for the ‘Concessional Travelling Privileges’ at page 8 of the MOU, it is a privilege and he stressed on the fact that throughout Annex 2 (to the Statement of Reply of Respondent), the ‘Concessional Travelling Privileges’ are referred to as privileges. He also laid stress on the last paragraph under heading B4 at page 11 of Annex 2 (quoted above). He stated that in this particular case the Respondent has not withdrawn the facility to travel on a free air ticket but has amended the facility offered following an option which existed in Annex 2 (the MOU in relation to Conditions of Employment). He then referred to the “principes de la non révision des contrats” and submitted that even the Tribunal cannot revise the contract to suit either of the parties.

Mr Mohamed also referred to the Supreme Court decision in the case of **Mrs Lan Hun Kuen & Anor v/s Air India 2001 SCJ 273**, where the Supreme Court held that a concessionary free air ticket (in the case of another airline) is a privilege and not a right and that the concessionary air tickets were rightly not included to compute the remuneration of the appellants. He also referred to cases in France where the courts have exceptionally allowed for variation of contracts when, for example, the economy or the employer runs the risk of being jeopardized. He suggested that if the pilots had indeed a right to concessionary free tickets, the parties would have been compelled in France to renegotiate the contract. The existence of an obligation to renegotiate the contract (in France) would be based on the fundamental obligation of the parties to act in good faith. Mr Mohamed suggested that the evidence shows that the pilots have not acted in good faith. They knew well that the price of petrol had gone up on various occasions, and yet they did not even ascertain how much their request for waiver of the fuel surcharge would cost to the Respondent. They instead declared a dispute and insisted on refund of the fuel surcharge. He referred extensively to **Jurisprudence, JCP/La semaine juridique, édition générale, 14 mai 2008** under the heading “Contrats et obligations” and to **Dalloz Action, Droit de la responsabilité et des contrats, 2004** and to **Traité de Droit Civil, Georges Ripert et Jean Boulanger, Tome II, Obligations, note 473**. He observed however that the law in France has been specifically amended to allow for revision of contracts in certain (limited) cases and that in Mauritius, the position is different and that “le principe de la non révision des contrats” still applies.

Mr Sauzier submitted that he fully agrees with the “principe de la non révision des contrats” and that the MOU (Annex 1 to the Statement of Reply of the Respondent) supersedes the individual contracts of employment. He stressed on paragraph 1(d) in the preamble of that document. Mr Sauzier argued that the Respondent has not pleaded that there is a risk that the company may be jeopardized if the application is granted. He also submitted that the case of **Mrs Lan Hun Kuen & Anor (above)** referred to by Mr Mohamed has to be distinguished from the present matter in that in the other case the ‘concession travel’ depended on a certain number of factors. He suggested that in the present matter the ‘travel benefit’ does not depend on any factor and that as Jet Captain for instance, the employee would be entitled to six, seven or eight tickets as of right. He also referred to the case of **De Chazal v Commissioner of Income Tax 1992 SCJ 31** where the Supreme Court held that remuneration included all benefits that are quantifiable.

Mr Sauzier also referred to the definition of ‘surcharge’ in **Black’s Law Dictionary** and he argued that it is not a fee as suggested by Mr Deenanuth. He averred that captains of Air

Mauritius are entitled to free tickets and in this case the surcharge is not imposed by Government but by Air Mauritius. He submitted that the Respondent could not have proceeded as they had done and that if they wanted to alter the entitlements of the pilots, they had to engage in discussions with the Applicant. The free ticket was a term and condition of employment of the pilots and could not be varied without consultation. In reply, Mr Mohamed stressed on the fact that the obligation imposed on either party not to seek to vary or alter any of the terms and conditions of employment must be read with another part of the agreement where the Respondent has specifically reserved the right to unilaterally amend the travel privilege. He also hinted to a power granted to the Tribunal to consider the economic situation of an employer.

The Tribunal has examined all the evidence on record including the submissions of both Counsel. The fact that pilots of other airlines may travel on Air Mauritius with free tickets and not be subject to fuel surcharge is neither here nor there since this will be under a different agreement, referred to as the 'ZED' agreement so that any rights and obligations of parties in that case would emanate from the said 'ZED' agreement (and not the MOU or individual contracts of employment).

The MOU (Annex 1 to the Statement of Reply) between the parties refers to several allowances which expatriate pilots are entitled to. Thus under clause 3 which bears the heading "Allowances", there are allowances such as expatriation allowance, flight duty allowance, responsibility allowance, transport allowance, housing allowance which are mentioned and there is no mention here of the travelling privileges. The 'Concessional Travelling Privileges' have, and to our mind deliberately, been included as a single item under clause 4. The said clause 4 reads as follows:

4. *Concessional Travelling Privileges*

Company will provide to the pilot on the Company's aircrafts and routes, travelling privileges as defined at Annex 5.

It is accepted by Mr Meiring on behalf of the Applicant that all the members of the Applicant have signed an option form to accept the terms and conditions of service set out in the MOU (including all the annexes thereof), and the option form signed by Mr Meiring (copy marked Doc A) is dated 11 June 2007. Annex 5 to the MOU bears the heading "Concessional Travel" and starts as follows: "Travelling privileges per year and per eligible family member, applicable upon the pilot assuming duty, will be as follows:- ...". At the end of the said annex, the following has been added as a 'Note': "Irrespective of the other provisions of this Agreement, more particularly with regards to Clause 6 on the Duration of the Agreement, Air Mauritius reserves the right to amend or withdraw this travel privilege at any time."

It is apposite to note that Annex 2 to the MOU which relates to the Conditions of Employment of the expatriate technical crew also refers to 'Concessional Travel Privileges' under paragraph B4 and there is again clear mention that Air Mauritius reserves the right to amend or withdraw this travel privilege at any time. This is also specifically repeated for pilots who have attained the age of 60. The travel privilege consists of free (air) tickets. The case is a clear case, and since the members of the Applicant have specifically agreed to Air Mauritius reserving the right to

amend or withdraw the travel privilege, the Tribunal finds that the Respondent was perfectly entitled to amend or even withdraw the travel privileges granted. Also, the MOU and annexes thereto are all consistent and always refer to the 'Concessional Travel Privilege' as a privilege. So long as this privilege has not been amended or withdrawn, the members of the Applicant are entitled to the privilege but it is only a privilege. They are entitled to the privilege in that they can claim a right to exercising their privilege but the travel privilege is certainly not a right to free tickets. If this was the case, the MOU and its annexes would have been drafted differently.

The Tribunal has no hesitation in finding that the Respondent has expressly reserved the right to amend or withdraw the travel privilege in the MOU with the consent of the representative of the Applicant. The members of the Applicant by signing the option forms only confirmed this. The Respondent has used this right to impose a fuel surcharge even on 'free tickets' and this was considered necessary or desirable in the light of fluctuations in the price of fuel. This does not go against the "principe de la non réversion des contrats" since the MOU provides for this right of the Respondent to amend or withdraw the travel privilege (only) at any time. The Tribunal thus finds nothing wrong in the manner in which the Respondent has proceeded and finds no merits in the points raised on behalf of the Applicant.

The new Employment Relations Act 2008 lays emphasis on meaningful negotiations between parties. Perhaps this issue ought to be part of management and the Applicant's agenda during their next meeting so that they can consider whether to impart a provision similar to that in the 'ZED' agreement. For the reasons stated above, the dispute is set aside.

(sd) Indiren Sivaramen
Vice-President

(sd) Bulram Tacouri
Member

(sd) Marie Pierre Jacques Henri de Marassé-Enouf
Member

(sd) Hurryjeet Sooreea
Member

8 April 2010