EMPLOYMENT RELATIONS TRIBUNAL

AWARD

RN 1031

In the matter of:-

RN 1031 Telecommunications Workers Union (Applicant)

And

Mauritius Telecom Ltd (Respondent)

The points in dispute in the present matter are:-

1. *Whether Management should immediately start negotiations with the union for the review of Pay, Grading Structure and Conditions of Service for period July 2008 to June 2012, or otherwise.*

2. *Whether the salary structure should be as per Annex 1 with effect from 01 July 08, or otherwise*

3. *Whether a career path of up to a maximum of 4 levels should be created for each grade/class, or otherwise.*

4. *Whether all allowances should be increased by 40% with effect from 01 July 08, or otherwise.*

5. *Whether employees exposed to particular risk at work should be paid a monthly risk allowance of Rs1000, or otherwise.*

6. *Whether the annual ceiling for the Medical Scheme should be increased to Rs50,000 for refund of total medical expenses incurred by employees, with effect from 01 July 08, or otherwise.*

7. *Whether a medical/surgical catastrophe cover insurance scheme funded by the Medical Scheme should be introduced, or otherwise.*

8. *Whether the conditions of the Earnings/Savings Scheme should be amended so as to render it possible for any employee to use such savings for education purposes, or otherwise.*

9. *Whether the training period for Ex Department of Telecommunications employees should be reckoned as effective service for pension purposes, or otherwise.*

10. *Whether the travelling grant/allowance payable should be increased as from 1st July 2008, as per Annex 2 or otherwise.*

11. *Whether employees on prolonged illness should be granted up to a maximum of 6 months sick leave on full pay and a further period of 6 months with half pay, or otherwise.*

12. *Whether shift employees should be allowed to retire with full pension after 25 years service, with effect from 01 July 08 or otherwise.*

13. *Whether an additional increment up to a maximum of three should be paid to employees for every period of two years who stagnated at their top salaries, with effect from 01 July 08, or otherwise.*

14. *Whether an additional bonus as shown hereunder based on profits realized by the MT Group should be paid to all employees at the end of each year with effect from 2008, or otherwise.*

PROFIT REALISED	***BONUS ENTITLEMENT***
-up to 1 billion rupees	*bonus equivalent to 1 month's earnings*
*-1billion **rupees** but less than 1 ½ billion*	*bonus equivalent to 1.5 months' earnings*
-over 1 ½ billion rupees but less than 2 billions	*bonus equivalent to 2 months' earnings*
-over 2 billions rupees	*bonus equivalent to 3 months' earnings*

15. *Whether a Housing Loan Scheme of a maximum of Rs 2 million with 3% interest p.a. refundable in 240 consecutive equal instalments should be introduced, or otherwise.*

16. *Whether a Rehabilitation and Restoration Service Incentive Scheme should be introduced with effect from 01 July 08, or otherwise.*

17. *Whether for the sake of transparency a representative nominated by the unions, should be appointed as observer on the interviewing panel for appointment and promotion, or otherwise.*

Mr Jugdhurry deposed on behalf of the Applicant and he stated that there was an Award delivered by the Permanent Arbitration Tribunal in the year 1995 which provided that there should be an exercise (at the Respondent) for the revision of salaries and conditions of service every four years. There have been revision exercises regularly ever since 1996 and the problem arose in the year 2008. He stated that there was no procedure agreement and that such an agreement was signed only in December 2009. He explained that for every revision exercise, the parties would agree on the terms of reference which will set out the procedure to be adopted for negotiations, and on issues where there is finally no agreement between the parties, the parties can go before an arbitrator or the Tribunal. He stated that for the revision exercise for the period 1996-2000, a salary commissioner was appointed but both parties agreed that the findings of the commissioner would not be binding on the parties. The Applicant and Respondent indeed sat down and discussed again on the report of the salary commissioner. In relation to unresolved disputes, the parties went before an arbitrator and his award was final and binding. For the next exercise in the year 2000, there was no salary commissioner, and the trade unions negotiated directly with Management. There was an agreement signed by other trade unions after the negotiations but the Applicant did not sign the agreement. Disputes were referred to the then Permanent Arbitration Tribunal and eventually the matter went to the Supreme Court. In the year 2004, there were again negotiations between trade unions and Management except that Management this time negotiated separately with each trade union. There was a collective agreement entered into by the Applicant and the Respondent and the agreement was for a period of four years ending 30 June 2008.

Mr Jugdhurry stated that some six to nine months before the collective agreement came to an end, the Applicant wrote to Management and requested for negotiation on procedures for negotiation for the revision exercise. Management did not reply to their request. He added that there was a common platform constituting of Mauritius Telecom Employees Association (MTEA) and the Applicant (a third trade union was not a party to this platform) to negotiate for the salary review exercise this time. The representative of the Respondent however informed them that the Respondent had appointed a salary commissioner, Mr Appana, and that if they had any representations, they should make them before the salary commission. The salary commissioner would submit his report to Management and then the latter would decide what to do. There would be no direct negotiation between the trade unions and Management. The members of the Applicant did not appear before the Appana Commission and Mr Jugdhurry explained that the Applicant was not agreeable to this course of conduct since Management was refusing to negotiate with the trade unions. He stated that though the Respondent could appoint someone like Mr Appana to do the work, the existing collective agreement could only be amended by way of another agreement just like this was the case with the report of Mr Matadeen. The unions, according to him, should still have been able to negotiate with the Respondent on the report (or more appropriately the recommendations) of Mr Appana. The Applicant declared a dispute even before Mr Appana started his work and the matter was already before the Tribunal when Mr Appana delivered his report.

Under the second item of the terms of reference, Mr Jugdhurry stated that the proposals of the Applicant for the salary structure as from 1 July 2008 is as per Annex 1 to the Terms of Reference in this case. He then proceeded to explain why a 40% increase was being sought. He elaborated on the other claims as per the Terms of Reference (except for disputes 5, 11, 12, 15, 16 and 17 which were not pressed).

In cross-examination, Mr Jugdhurry confirmed that the Applicant has withdrawn five items as per the Statement of Case of the Applicant (in fact six items withdrawn as per the same document). He conceded that even in the year 2008, there was a revision of salary at the Respondent except that this was done, according to him, unilaterally. He agreed that the Respondent made a revision of salary as from 1 July 2008 following a salary commission and a report drawn up by Mr Appana. He had no reason to doubt that the Board of Directors of the Respondent and more than 83% of the workers of the Respondent had approved and accepted the recommendations of the salary commission. Mr Jugdhurry maintained however that the salary revision exercise in the year 2004 was carried out by way of a collective agreement and that the only way to amend the collective agreement would be by way of another collective agreement. He agreed that there have been salary commissions appointed before but he stressed on the fact that recommendations were made and that it was still for the Trade Union and Management to reach a collective agreement based on the recommendations of the salary commission. There were still issues proposed by salary commissions which were not accepted and had to be brought before the Tribunal.

Mr Jugdhurry agreed that the Respondent had informed trade unions and the staff that the Respondent had appointed Mr Appana to carry out a salary revision exercise. He stated that the Applicant informed Management that they were not agreeable to same. He had no problem that Mr Appana was appointed but he stated that the change in conditions of work had to come by way of a collective agreement after negotiation between the recognised Trade Union and Management. He stated that there are three trade unions at the Respondent: MTEA, Telecommunications Employees and Staff Association (TESA) and Applicant. He did not agree that the Respondent proceeded as he did because it was not possible to have the consents of all three trade unions. There was no joint negotiating panel and the Respondent had to discuss with each of the trade unions individually. Mr Jugdhurry stated that this is still the case and that the Respondent has now entered into three procedural agreements with the unions. He accepted that Management had communicated to trade unions the terms of reference of Mr Appana. The Applicant did not send any comments on the terms of reference since the Applicant was not agreeable to the procedure adopted whereby the report would be submitted to the Board of Directors who would then implement the report. No application was made to seek an injunction from the Supreme Court against the Respondent. Mr Jugdhurry was referred lengthily to the contents of a letter dated 9 May 2008 sent by Management. He stated that the Applicant did not consider in detail the terms of reference mentioned in the said letter. He was aware that following the report of Mr Appana, there was a communiqué which was issued to all the staff informing them of the submission of the report. He took cognizance of another communiqué addressed to the staff dated 5 September 2008 where the main highlights of the Appana report were mentioned under ten items. When questioned as to whether there was a meeting of the members of the Applicant to discuss on the report, Mr Jugdhurry replied that there was a meeting of the members before the dispute was declared and that it was agreed that the stand of the Applicant would be that the Respondent cannot amend the conditions of service without negotiation with the Applicant. The Applicant has maintained this position throughout.

Mr Jugdhurry agreed that many of the members of the Applicant had accepted the new conditions but he then averred that in many cases there have been allegations that the employees have been forced to sign the option forms. He did not agree that the Applicant, among the two other unions, was making claims for about 15% of the staff of the Respondent. He averred that the Applicant was making representations for <u>all the workers</u> (underlining is ours) of the Respondent since the collective agreement signed in the year 2004 applied to all workers. He conceded that every four years the employees of the Respondent have received an increase in salary but he could not say if they were granted the following increases in salary: in the year 1996, 12% and in the year 2000, 15%. He however conceded that in the year 2004, the increase was 16.5% and in 2008 the increase proposed following the report of Mr Appana was in the range of 20 to 26%. He agreed that it is the Respondent which pays for the pension of Respondent's retired employees and that employees do not have to contribute for their pensions. He added that this has its source in the historical background of the Respondent which was initially a Government entity and which was subsequently

privatized. He did not agree that the running pay bands introduced with the report of Mr Appana was an improvement on the system of individual salary scales.

Applicant's representative did not have exact figures with him but he stated that about 400 to 500 members of the Applicant out of 900 members had accepted the Appana report. He stated that the proposed new salary structure resulted in an average increase in salary of 26%. He did not agree that Mr Appana arrived at a percentage of 26% because the loss of purchasing power over that period was 33% and this percentage was adjusted after taking into consideration yearly compensations agreed by Government. Mr Jugdhurry was further cross-examined in relation to specific items in the Terms of Reference.

Mr V. K Appana who retired as Director of the Pay Research Bureau was then called to depose as a witness for the Respondent. He referred to his long experience and numerous consultancies he has carried out. He was approached by the Respondent to carry out a review of the pay structure at the Respondent. He stated that the Respondent was operating commercial lines and is an organisation that faces competition. There was a request from the Respondent and the unions to introduce a system of running pay band to deal with the issue of stagnation of salary for employees who had reached their top salaries. He stated that a reward mechanism where there is a strong linkage between performance and pay befits an organisation that faces competition. For the period 2004 to 2008, the cumulated rate of inflation was 33%. This was, according to him, a very important consideration in carrying out his exercise and he proposed an increase in the range of 29.17% to 39% when compared to salary as at June 2004. He averred that the introduction of pay bands is to the advantage of employees and has allowed higher increases than would have been possible with the existing fixed scale system. He stated that the system of increment proposed which can go up to 5.5% is a better system than the existing one when properly applied. He added that all employees have obtained an increase in salary of at least 3.5%. He averred that the remuneration system and package place the Respondent in the same league as the private sector or in between the public and private sector, and that Management felt that there was a need for a trade-off. Thus, the number of days' leave was reduced from 30 days to 26 days which represents a reduction of only 1.5%. He stressed on the fact that the employees have been very much compensated for this trade-off.

In cross-examination, Mr Appana stated he was approached by the Respondent in or around April 2008. He stated that he usually does not accede to all the requests of one party but he could not off-head give an example of a proposal emanating from Management which was turned down. He was paid by the Respondent for this exercise. He agreed that his terms of reference did not require him to consider any collective agreement, and that there is no mention of collective agreement in his report. He was questioned in relation to the transition from annual increment to merit increment and he agreed that in some specific instances it may happen that an employee receives no increment (0%). In re-examination, Mr Appana produced a copy of the terms of reference of the salary commission (Doc A).

Mr S Puddoo then deposed on behalf of the Respondent and he stated that every four years there is a review of salary at the Respondent. There are three trade unions representing workers but there is no common platform for negotiations. Meetings had to be held separately with each trade union and for the 2008 exercise, Management decided to appoint someone with experience in salary review to carry out the review. He explained that the Respondent operates in a competitive environment and to ensure a timely review exercise and to keep everyone focused on the activities of the Respondent, this measure was taken. Mr Puddoo stated that there were meetings with the trade unions and they were informed of the intention of the Respondent. Copies of a letter and draft agreement emanating from the common platform consisting of the MTEA and Applicant were produced (Doc B) as well as the reply from Management dated 9 May 2008 (Doc C). The other two trade unions made representations before Mr Appana but the Applicant did not. The report of Mr Appana was approved by Respondent and the trade unions were informed of the report through the internal website of the Respondent. He added that 85.7% of all employees concerned have accepted the new terms and conditions by signing option letters and only 14.3% of employees have not and are thus governed by a different regime since July 2008.

Mr Puddoo averred that the Respondent cannot financially provide a salary increase of 40% across the board as requested by Applicant. No steps were taken to prevent Mr Appana from proceeding with his review exercise, and the terms of contract of those who did not accept the Appana report were not varied. He averred that performance monitoring has been successfully implemented and that this allows the company to reward persons who are putting in more efforts. The 14.3% of employees who have not accepted the Appana report still obtain their annual increments.

In cross-examination, Mr Puddoo stated that as far as he recollects the Respondent has no collective agreement with Applicant for the period 2004 -2008 and that there is no stated agreed mechanism for conclusion (or revision) of collective agreements. When confronted with Appendix 5 of the Statement of Case of Applicant, he averred that this was an agreement between Management and Applicant but that he would not consider same to be a collective agreement. He stated that for variation of the agreements, different mechanisms have been used in the past and that it was for the Board of Respondent to decide on the 'modus operandi'. He curiously stated that he did not discuss with the unions about the possibility of negotiation with a Joint Negotiating Panel. He then stated that the idea of a Joint Negotiating Panel was never agreed and that two trade unions namely Applicant and MTEA were not ready to sit together with TESA. He added that salary review exercises keep dragging on and on at the Respondent. Following the review in the year 2000, a dispute was brought by one of the trade unions and Management was dragged into long processes. He stated that this time, the Board in its wisdom decided to opt for the appointment of a salary commissioner. This process, according to him, gave ample time to the Unions or even individual employees to make representations to an independent Commissioner on the same footing as Respondent. He was also cross-examined in relation to a few specific items in the Terms of Reference.

In re-examination, Mr Puddoo produced copies of documents in relation to a dispute referred to the then Permanent Arbitration Tribunal by the same Applicant and an appeal, which would have been set aside, lodged against the ruling of the Tribunal in that same case (Doc D).

Mr Basset then submitted on what constitutes a collective agreement. He referred to the reflections of **Dr D. Fok Kan** on collective agreements in **The Law of Industrial Relations** (Doc E), "Les Conventions Collectives" in "**Les Relations Individuelles de Travail**" still by **Dr D. Fok Kan** (Doc F), Section 56(1)(a) of the Employment Relations Act 2008 (hereinafter referred to as "the Act"), the case of **State Bank of Mauritius Limited v A.Jagessur 2008 SCJ 8** (copy marked Doc G) and the Canadian cases of **Charles Sadler v The City of Surrey and Canadian Union of Public Employees 2003 CanLII 62769** (copy marked Doc H) and **Autotote Canada Inc. v Service Employees' International Union 2002 CanLII 52757** (copy marked Doc I). He suggested that there was no collective agreement between the parties and that the agreement entered between the parties (as per Appendix 5 to the Statement of Case of Applicant) was a "transaction" as per Article 2024 of the Civil Code. He also referred to Doc B emanating from the Applicant and to the fact that the Applicant did not mention therein any existing collective agreement. He submitted that legal steps could have been taken to seek an injunction from the Supreme Court against the exercise being carried out by Mr Appana. Mr Basset also laid much emphasis on the fact that 85.7% of the employees had accepted the new terms and conditions so that there is no live issue before the Tribunal concerning them. In relation to the remaining employees, he submitted that the origin of the dispute is misconceived and that they could have made representations at the appropriate moment. In the absence of a collective agreement they had no right for direct negotiations. Their conditions of work have not been changed, and given the particular circumstances they cannot have any claims against Respondent. On the merits of the case, he relied on the evidence of the expert witness.

Mr Nuckchady started his submissions by stressing on the need for good industrial relations and the behaviour required of an employer towards his employees. He referred to the whole purpose of granting recognition to a trade union which should be able to have negotiating rights on pay and conditions of employment. Mr Nuckchady referred to the definition of a collective agreement under the old Industrial Relations Act 1974, and submitted that the issue is how do we go about to change a collective agreement. He argued that as far back as the year 2008, the decision was taken not to talk to trade unions in relation to the review exercise. He also referred to an Award delivered by the then Permanent Arbitration Tribunal in the case of **State Informatics Ltd Staff Union v State Informatics Ltd (GN 1805 of 2005)** and relevant provisions in the Act. In reply, Mr Basset argued that if the Applicant's case is to be accepted, there will be serious problems in terms of who will be bound by the Award of the Tribunal and if workers will be allowed to renege novated contracts of employment which they have accepted.

The Tribunal has examined all the evidence on record including documents produced and submissions made. This matter has been referred to the then Permanent Arbitration Tribunal under the old Industrial Relations Act 1973. The Act now makes provision for the arbitration of such disputes before the Employment Relations Tribunal:-

Section 108 (Transitional provisions) of the Act at sub-section 10 reads as follows:
"*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*." It is apposite to note that under the Act, the disputes as declared by the Applicant can now be entertained by the Commission for Conciliation and Mediation but if there is no settlement between the parties, the matter cannot (underlining is ours) be referred to the Tribunal by the Commission. The parties can only come before the Tribunal if both parties refer the matter for voluntary arbitration to the Tribunal. This is a deliberate change made by the legislator and the Act makes a clear distinction between an individual worker and a trade union of workers. Because of the transitional provision in the Act (Section 108), the proceedings may be proceeded with before this Tribunal. The legislator has used the words "may be proceeded with before the Tribunal" and not "shall be proceeded with before the Tribunal". There is a logical explanation for this and this is found at part 6(2) of the Second Schedule to the Act under the sub-heading "Practice and Procedure of the Tribunal" which reads as follows:

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

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

(b) dismiss any matter or refrain from further hearing or from determining the matter, if it appears to the Tribunal that the matter is trivial, or that further proceedings are unnecessary, or undesirable in the public interest;

…

These powers are specific to this Tribunal and are not powers generally granted to Courts of law for example.

The Applicant has relied on Appendix 5 to his Statement of Case to aver that there was a collective agreement between the parties. In the preamble to that document, there is reference to an agreement entered into on 7 July 2004 by both parties "relating to a review of Salary, Grading and Conditions of Employment for employees of the Company belonging to non-managerial grades". Appendix 5 is an additonal agreement in relation to an increase in salary and allowances as from 1 July 2004 and to other terms and conditions of work. This document together with the agreement of 7 July 2004 (along with any other relevant agreements entered into between the parties) form part of the collective agreement existing between Applicant and Respondent. A

collective agreement is defined in the Act as "*an agreement which relates to terms and conditions of employment, made between a recognized trade union of workers or a joint negotiating panel and an employer*." There is no need to refer to general principles such as "transaction" under the Civil Code when we are in the realm of employment relations and the agreements concerned fall squarely under the definition of collective agreements. The Canadian cases referred to by Mr Basset are not of assistance to us the more so that the definition of "collective agreement" in the Canadian Labour Relations Code is different from ours. In any event, the case of **Charles Sadler (above)** is only proposition that a settlement agreement which does not set out terms and conditions of employment (underlining is ours) does not fall within the definition of a collective agreement. Also, in line with the case of **State Bank of Mauritius Limited v A.Jagessur (above),** the intention of the parties is present since even Mr Puddoo in his letter dated 9 May 2008 addressed to the MTEA and the Applicant refers to the wish of Management to reach a "new Collective Agreement which will be effective 1 July 2008."

Now, if the Tribunal finds that for the period as from 1 July 2004 there was a collective agreement between the parties, the next question is how is collective bargaining to be conducted at or before the end of that collective agreement with a view to renewing or revising it. There is absolutely no evidence at all that there was an agreed procedure laid down in the collective agreement. On the contrary, the Tribunal finds that at least for grading and classification of posts, both parties had agreed at preamble (B) of Appendix 5 (above) that this will be carried out by an external consultant Core Services Ltd and the report of the consultant would be implemented once finalised as per the agreement of the parties.

In the absence of any agreed procedure (as opposed to now where there is a procedure agreement between the parties), an employer and a (recognised) trade union or group of trade unions still have a duty to bargain in good faith. Bargaining in good faith requires the trade union or group of trade unions and the employer to meet and discuss meaningfully any variation of a collective agreement including matters relating to the initiation of the bargaining for the renewal of a collective agreement.

The law (more appropriately the relevant Code of Practice), be it under the old Industrial Relations Act or under the new Act, makes it clear that it is in the interests of one and all that any defined group of employees which can appropriately be covered by one negotiating process in an undertaking be represented by a single trade union or a joint negotiating panel. For instance, Section 58 of the Code of Practice under the old Industrial Relations Act (corresponding provision now under Section 95 of the Fourth Schedule to the Act) read as follows:

"The competition of separate trade unions for the right to negotiate for the same grades of employees leads to friction and weakens the trade unions."

There can be two or more trade unions representing a defined group of employees or one bargaining unit but in this case the responsibility is with the trade unions to put heads together and operate as a common platform in relation to negotiations on crucial

issues such as reviewing of collective agreements. For the salary review of 2008, it is not disputed that there was no common platform involving the three existing trade unions at the Respondent. Previously, meetings had to be held with each trade union separately. Explanations have been given by Mr Puddoo as to why the services of Mr Appana were retained this time and he stressed on the competitive environment in which Respondent was operating and the need to ensure a timely review exercise in the interest of all parties. He also referred to previous salary review exercises where matters have dragged on following legal action by one or more parties. Mr Puddoo very importantly stated that there were meetings with the trade unions and that they were informed of the intention of the Respondent. The trade unions and even individual workers had the right to make representations to the salary commission and there was a further exercise envisaged in the terms of reference of the salary commission (Doc A) for further representations to be considered in relation to matters on which there was still disagreement. The two other trade unions deposed before the salary commission whereas the Applicant decided not to make any representations before the said commission. There is evidence that there are workers of the Respondent who are members of one or more of the trade unions and this is not a case where each trade union represents one particular bargaining unit.

Signing separate collective agreements with different trade unions for the same bargaining unit (or grade or category of workers) is not advisable (even if such an exercise was apparently carried out in 2004 at the Respondent) unless the terms of the agreements are the same. And if the terms are the same, there is no compelling reason for having separate collective agreements. The principal aim of trade unions is to promote their members' interests and with all three trade unions having the same 'common interest', the Tribunal finds that the three trade unions should have endeavoured to form a common platform to negotiate with the employer for the terms and conditions of work of workers in that bargaining unit.

The Tribunal finds nothing wrong or unreasonable in the stand adopted by the Respondent in the light of the particular circumstances of the case, except that ideally there should have been collective bargaining with the unions as a common platform. Also, and very importantly in the absence of an agreed procedure for variation of the collective agreement and since parties could not agree, the collective agreement died a natural death (on 30 June 2008) and though 85.7% of all workers concerned later accepted the new terms and conditions of work, there was no new collective agreement (at least involving Applicant) and the employer did not unilaterally amend or vary the collective agreement.

The Tribunal at this stage wishes to refer specifically to the manner in which the points in dispute have been drafted. For instance, points in dispute 1 and 2 read as follows:

1. *Whether Management should immediately start negotiations with the union for the review of Pay, Grading Structure and Conditions of Service for period July 2008 to June 2012, or otherwise.*

2. *Whether the salary structure should be as per Annex 1 with effect from 01 July 08, or otherwise*

Even before the Tribunal, the stand of Applicant was that the Tribunal should still consider point in dispute 1. Obviously, if this point in dispute is to be answered positively thus in favour of the union, there would be no need for the Tribunal at this stage to consider the other points in dispute. The Tribunal fails to understand what Applicant really wants: whilst seeking direct negotiations with the employer for the salary review 2008, the union is also praying for an Award in relation to pay, terms and conditions of work for the same period. This shows the state of mind of the Applicant when this dispute was declared. Mr Appana was about to or was starting to hear representations from parties for the salary review 2008 and disputes were being declared in relation to pay, terms and conditions of work for the same period. This was most unwarranted and whilst point in dispute 1 could be envisaged, certainly the other points in dispute were premature or unnecessary being given that Mr Appana could very well have provided for more favourable terms and conditions to the workers.

In the absence of any agreed procedure for the reviewing of the collective agreement and for all the reasons given above, the Tribunal finds that it cannot award that Management should immediately start negotiations with Applicant for the review of Pay, Grading Structure and Conditions of Service for the period July 2008 to June 2012. Point in dispute no 1 is set aside but suffice it to say that the dispute has been considered bearing in mind the law in force at the time the dispute arose and that different considerations may apply if the dispute arises under the new Act where an Order (as opposed to an Award) may be sought the more so in the face of a procedure agreement signed by the parties.

As regards the other disputes, the Tribunal will refer to Section 56 of the Act where it is provided that a collective agreement signed by one or more trade unions representing more than 50 per cent of the workers in a bargaining unit shall bind any other trade union which refuses to sign the agreement. A fortiori, new terms and conditions accepted by 85.7% of all workers concerned shall also bind a trade union (in the same bargaining unit) even if the latter claims that it represents all the workers constituting the 14.3% who have refused the new terms and conditions. Mr Nuckchady suggested that the problem concerning the 85.7% of workers who have accepted the new terms is not the problem of the Applicant but only that of the Respondent. The Tribunal does not agree with such an argument. Indeed, Section 72(1) of the Act reads as follows:

72. Award and its effects

(1) An award of the Tribunal shall be published in the Gazette and shall –

(a) state the parties to whom the award applies;

(b) state the reasons for the award;

(c) be binding on all the parties to whom the award applies;

…..

This provision is in substance very similar to the then corresponding section 85 in the repealed Industrial Relations Act except that the binding nature of an Award was for a period not exceeding two years as the Tribunal could determine. Also, under both legislations, it is clearly provided that the Award shall become an implied term of every contract of employment between the workers and the employers to whom the Award applies. Thus, in the present case it is essential that the parties who will be bound by the Award be clearly defined. We thus need to know in which capacity the Applicant has declared the present disputes. The Tribunal will here refer extensively to the reflections of **Dr D. Fok Kan** in **The Law of Industrial Relations (see above).** The latter at page 85 of his book states the following:

"*French trade unionism has always been characterised by weak and conflictual trade union pluralism. In such a system the interest of the workers could hardly be perceived as being protected within the trade unions and this is probably what led French writers to focus their attention on the workers themselves and delimit this 'collectivity' of workers which though deprived of legal personality, has an interest of its own which needs to be protected. It is with this aim in mind that the whole idea of representativeness has been developed. Thus the interests of the employees are perceived not so much as being protected within the trade unions as being protected through them. As such the right to collective bargaining does not belong to the unions but is merely exercised by them on behalf of the collectivity of workers, whether this right belongs to the workers collectively or belongs to them individually but is exercised collectively. The exercise of this right of representation on behalf of the workers by the trade unions is legitimated by their representativeness."*

He then refers to versions of the notion of representation which have been offered and added at page 87 the following:

"*Under both versions, the choice of the person to exercise this power of representation depends on his legitimacy for doing so. The legitimacy of a father or a mother in acting for their child stems from the simple fact that they are his parents. That of members of a legislative assembly is that they have been elected. The legitimacy in the case of a trade union stems from its representativeness. Representativeness is here not merely a legal concept, but constitutes also "a sociological quality which entitles the [trade union] to be identified with the [employees] and justifies [its] fitness to express [their] aspirations accurately." It presupposes the existence of an interest that requires to be protected, here that of the employees. Even before the French legislature intervened to regulate the legal regime of collective agreements, French authors had demonstrated the link between the immediate, automatic and inderogable erga omnes effect of collective agreements and the existence of a bond of solidarity which forms and unites the collectivity of employees. The key to the representation system is the recognition*

that there exists an autonomous interest emanating from the collectivity of workers which the trade unions represent."

At page 88, **Dr D. Fok Kan** adds

"*The key element which allows the union to negotiate with the employer is its representativeness. This acts as a sort of selection mechanism and gives the trade unions concerned a form of legitimacy to act for the whole of the bargaining unit it represents. The trade union when it concludes an agreement clearly does not act on behalf of its members, nor on behalf of individual employees, but as representative of the interest of that bargaining unit, which is determined according to the common interest of the workers in the unit. That the trade union is here representative of an interest and not of individual employees, members of the trade union or not, can also be seen in the distinction that the legislature makes between recognition for negotiating rights and that for representational status. It is in this latter capacity that the union acts as representative of individual employees" (underlining is ours).*

The present disputes were declared because the Applicant averred that collective bargaining was not taking place. The disputes relate to the whole salary structure and terms and conditions of work of workers from salary scale SS1 to SS10 and clearly the representative of Applicant when declaring these disputes and deposing before the Tribunal was acting in virtue of the recognition that the union had for negotiating rights. The union was not acting here as representative of individual workers. "Representational status" is defined at section 2 of the old Industrial Relations Act as "*the authority of a trade union of employees to represent a member of that trade union in any difference between the member and his employer in which the member is relying on his legal rights."*

In this particular case, Mr Jhugdhurry could not even say how many of the members of the Applicant had not accepted the new terms and conditions and merely stated that some 400 to 500 members of the Applicant out of a total of 900 members had already accepted the new terms and conditions. Even within the members of the Applicant, it is not clear whether Applicant has a simple majority of members who are not agreeable with the new terms and conditions. Now the unchallenged evidence is that 85.7% of all the workers concerned (in the relevant bargaining unit) have already accepted the new terms and conditions. The issue of option forms signed by workers has been dealt with by the Tribunal in a number of cases. In a Ruling delivered in the case of **Telecom Engineers, Senior Telecom Engineers and Principal Telecom Engineers v Mauritius Telecom RN 622,** the then Permanent Arbitration Tribunal referred to what was stated in a Ruling dated 12 January 2005 delivered by the same Tribunal in **Telecommunications Workers Union and Mauritius Telecom RN 754**: "*We need to address our mind on the issue of Option Form first. True it is that in a few past Awards, the Tribunal held that a dispute may be delivered notwithstanding the signing on an Option Form agreeing on new Terms and Conditions of employment.*

This present Tribunal respectfully disagrees with that Obiter Dictum. Adopting such a course would in our view allow employees to having it both ways. The very fact of putting their signatures on the new Terms and Conditions of Employment is an act of finality. To come and say that they disagree over what they agreed can only lead to some sort of absurdity and thus rendering 'caduc' the contract they signed. We are further comforted in our stand by the amendment introduced by the legislature in July 2003 regarding Option Form." The above was also quoted with approval in the cases of **University of Mauritius Academic Staff Association And University of Mauritius RN 890** and **T.S.M. Cunden & 5 Others And Technical School Management Trust Fund RN 1028.** The Tribunal finds no reason to depart from this established cursus of the then Permanent Arbitration Tribunal and of this Tribunal.

The crux is whether the disputed issues are issues that are foreign and/or independent of what had been agreed. In the present case, the 85.7% of workers concerned have agreed on the new terms (including salaries) and conditions of work following the Appana report. All the issues in dispute which were pressed refer to terms and conditions of work, and the Tribunal finds that the Applicant cannot proceed with disputes 2 to 17 as "representative of the interest of that bargaining unit" for all the reasons given above. Also, when majority have opted and minority does not follow, it impacts upon uniformity. The Tribunal cannot be viewed to condone disparity in conditions of work.

All the disputes are thus set aside. The Tribunal is however confident that with the new Act and the procedure agreement which has now been entered into by both parties, good industrial relations would prevail.

(sd) Indiren Sivaramen
Vice-President

(sd) Geeanduth Gangaram
Member

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

(sd) Maurice Christian Aimé Laurette
Member

7 December 2010