EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN/101/2014

AWARD

Before:

Shameer Janhangeer	**Vice-President**
Ramprakash Ramkissen	**Member**
Jay Komarduth Hurry	**Member**
Khalad Oochotoya	**Member**

In the matter of: -

Baboo Anoop Kumarsingh RAMDOUR

Disputant

and

IRRIGATION AUTHORITY

Respondent

The present matter has been referred to the Tribunal for arbitration by the *Commission for Conciliation and Mediation* (the "*CCM*") pursuant to *section 67 (9)* of the *Employment Relations Act* (the "*Act*"). The terms of reference of the disputes read as follows:

1. *Whether an unreasonable warning was issued to me by the Irrigation Authority as per letter 09 January 2013 and whether same should be withdrawn or otherwise.*

2. *Whether I should have been called for interview for the post of Vehicle Controller by the Irrigation Authority following an internal notice issued on 22 November 2012 and my application for the said post or otherwise.*

Mr B.A.K. Ramdour was assisted by a Trade Union representative Mr R. Imrith, whereas the *Respondent* was assisted by State Counsel instructed by the Principal State Attorney. It is pertinent to note that at the close of the hearing of the case, the *Disputant* did not insist with the second point of the dispute referred and the Tribunal shall make its award solely in relation to the first point of the terms of reference of the dispute.

THE DISPUTANT'S STATEMENT OF CASE

The *Disputant* has submitted a statement of case in relation to both disputes. Mr B.A.K. Ramdour joined the *Irrigation Authority* on 01 October 1984, was appointed Driver on 01 August 1985 and transferred to its pensionable and permanent establishment as from 1 October 1989. On 25 October 2012, he was by way of letter, asked to furnish explanations regarding refuelling of van 165 JN 08 on Monday 22 October 2012. He submitted his explanations in a letter dated 29 October 2012. He received a reply dated 09 January 2013 informing him that the issue of diesel is done from 12.30 to 13.30 hrs on Mondays, Wednesdays and Fridays in the presence of Supervisors and was given a warning for his irresponsible attitude. The *Disputant* thereafter sent a letter dated 25 January 2013 to the General Manager of the *Respondent* in relation to the warning and the term irresponsible attitude which he considered to be frivolous, unfair and causing him severe prejudice and requested that the warning be withdrawn.

Mr Ramdour is being blamed for lack of fuel in van 165 JN 08 on 24 October 2012 with refuelling of the van which had to be effected on 22 October 2012. He avers that the van was driven by other drivers on 22 October 2012 after his shift with the vehicle and on the following day. As per the log book, the van ran some 68 kilometres. The *Disputant* has

averred that as per his scheme of service, for the post of Driver, it is not his responsibility to control refuelling; which is that of the Vehicle Controller who is under the supervision of the Divisional Irrigation and Operation Officer.

Regarding the second dispute being referred, the *Disputant* applied to an Internal Notice of Vacancy for the post of Vehicle Controller at the *Respondent* organisation on 22 November 2012. He was not, to his surprise, called for the interview. He addressed a letter dated 4 July 2013 to the General Manager complaining of victimization to his regard in not being called for the interview. The General Manager once more failed to consider his plea. He has also set out a summary of his experience with the *Respondent* having 30 years' service and has also worked as trainee Supervisor and replaced the Vehicle Controller. He also stated his qualifications and annexed same.

THE RESPONDENT'S STATEMENT OF CASE

The *Irrigation Authority*, in its statement of case, has notably averred in relation to the first point in dispute that explanations were sought from the *Disputant* as to the refuelling of van 165 JN 08 on Monday 22 October 2012 during the second shift. Following his letter dated 29 October 2012, the *Disputant* was given a warning. The views of Mr Takoor, Head of Operation and Maintenance, were set out with regard to the incident notably stating that as per usual practice fuelling is carried out on Mondays, Wednesdays and Fridays in the presence of an Irrigation Supervisor or a Helper to him; the driver has a duty to inform the Irrigation Supervisor if there is a need to refuel a vehicle; vehicle 165 JN 08 was not refuelled on 22 October 2012 and irrigation operations were affected on 24 October 2012 as less poses were done.

It has notably been averred that vehicle 165 JN 08 was refuelled on 19 October 2012 and thereafter used during the second shift on Monday 22 October 2012 by the *Disputant* from 13.00 hrs to 19.00 hrs (according to the log book). Due to lack of refuelling, irrigation

operations started at 08.40 hours instead of 06.30 hours and only 7 poses were carried out instead of about 12 to 16 poses, which caused prejudice to planters.

In relation to the second item of the dispute, the *Respondent's* Statement of Case has averred that the *Disputant* has performed the duties of *Vehicle Controller* in the past as well as working as Helper to the Supervisor during 1991/1992. The *Respondent* received 7 applications to the internal advertisement for the post of Vehicle Controller dated 22 November 2012. The *Disputant* did not, as was required, produce any documentary evidence in relation to his qualifications and experience and was not called for the interview.

In reply to a letter dated 4 July 2013 from the *Disputant*, the latter was informed that he was called for the aforesaid interview as he did not produce any documentary evidence in support of his experience in the transport section as was required by the vacancy notice.

EVIDENCE OF WITNESSES

Mr B.A.K. Ramdour was called to adduce evidence by the Trade Union representative. He stated that he is a driver at the *Irrigation Authority* since 1985. As regards the incident of Monday, the 22 October 2012, the *Disputant* stated that he works two shifts starting at 0600 hours finishing at 1 pm, the next day at 1 pm finishing at 8 – 9 pm. On the aforesaid date, he worked the second shift from 1 pm to 9 pm. As Driver, he checks the water, oil and fuel of the vehicle as per his scheme of service. Upon finishing work at 9 pm, he returned to his home. The vehicle was left at the workplace. He noted the mileage. On the next day, he was off duty. He returned to work on Wednesday, the 24 October at 6 am. He checked the vehicle as usual, informed his Supervisor, Mr Beerbul, who told him to wait for the Store Officer as he has to refuel and go for work. When he had checked, the fuel was low and he refuelled at 9 am. According to the log book, he noticed

that the vehicle was driven after he left same Monday night. It is possible that the vehicle was driven on Tuesday for 68 kilometres. According to the log book, it is written who drove the vehicle. The Vehicle Controller has the responsibility to check fuel.

On Monday 22 October 2012, the fuel was three quarters full in the said vehicle. At the end of the second shift, there was the same level of fuel. He thereafter stated that there was enough fuel for the vehicle to run. The vehicle was in the workshop, there was no one at the fuelling section and he informed his Supervisor of the level of fuel in his vehicle. When he left the vehicle on Monday night, there was enough fuel in the vehicle for the following day. He was thereafter reported for not refuelling. He gave his explanations in a letter. No internal inquiry was carried out. He works at Plaines des Papayes since 1984. He has never received a handbook setting out the procedures regarding disciplinary action against a worker. What he has stated in his statement of case is true.

Mr Ramdour was also questioned by Counsel for the *Respondent*. Regarding the first point in dispute, Mr Ramdour stated that he was not aware that refuelling is done between 12.30 and 13.30 hrs. He refuels in the morning when he works the first shift. There are times when he needs to refuel outside usual hours and he needs to make a request to the Supervisor. He worked the second shift on Friday, the 19th October in the same van. The van was not used during the first shift on Monday, the 22nd of October and its level of fuel was at 90 per cent. If a driver used the vehicle on the next day, he would have had to inform the Supervisor if it needed to be refuelled. The fuel requisition form is filled by the Store Officer and he just signs. The Supervisor makes the request to the store for fuel; the Vehicle Controller is not concerned with the fuel requisition form. He agreed that he made 13 requests for fuelling between January and September (2012), two occasions of which were made in the morning. Despite a table (later produced as Document K) showing that he refuels on Mondays, Wednesdays and Fridays between 12.30 and 13.30 hrs, he stated that he fuels according to the indicator. Referring to the disruption in the irrigation operations of the 24 October 2012, he stated that it is not the first time that this problem has occurred. He is not at fault for the disruption caused on the day.

According to an Irrigation Record Sheet dated 24 October 2012 (later produced as Document C), he covered Zones A and B during the first shift showing that he effected 7 poses. He normally does 12 poses in a day. He agreed that the vehicle was fuelled on 19 October 2012 at around noon by another driver. He worked on Sunday, 21 October during the first shift. There are other drivers who use the vehicle. He noticed in the log book that watchmen had used the vehicle on the night of the 22 October. According to the progress of irrigation operation of 24 October 2012, a remark was made by the Supervisor Mr Beerbul as to the lack of fuel in vehicle 165 JN 08. He does not agree that an inquiry was carried out by the management. He produced a letter dated 25 October 2012 from the *Irrigation Authority* (Document B) asking him for explanations. He does not agree that he was negligent. He also stated that (about) 12 poses are effected in a shift.

Mr Binrshwarsingh Beerbul, Supervisor at the *Irrigation Authority*, was called to adduce evidence on behalf of the *Disputant*. He stated that the filling station at Plaines des Papayes delivers fuel every Wednesday. If a vehicle has no fuel, a request has to be made to refuel. He is aware that Mr Ramdour was working in a vehicle on 22 October and that he was the Supervisor. Mr Ramdour is a good driver, a good worker and he had no problems before the incident. Mr Beerbul also produced an 'Irrigation Record Sheet' dated 24 October 2012 (Document C), which he had filled as well as a 'Process of Irrigation Operations' dated 24 October 2012 which he had filled and signed (Document D). In the latter document, it was written that there was a fuelling problem on 24 October 2012 for vehicle 165 JN 2008 and that the vehicle started work at 0840 hrs. He sent a memo to management, who in turn made an inquiry to know why operations started at 0840 hrs on the aforesaid date instead of 0630 hrs. He was asked to give his comments in writing but does not remember if he did give an answer as it was in 2012. He also stated that he did not write '*fuelling problem*' on the form.

Mr Chatta Hookoom, General Manager at the *Irrigation Authority*, was also called as a witness by the representative of the *Disputant*. He stated that disciplinary procedures are

dealt with at the level of the administrative department. There is no handbook in relation to disciplinary procedures existing in the organisation but they follow what is strictly in the *Human Resource Manual* which is also applicable to parastatal bodies. He added that there is no procedure agreement as the trade unions have refused to sign. They also make use of the *Public Service Commission Regulations* where it may be adapted. According to him, employees are versed with the procedures. There is no counselling service as such in his organisation but the Human Resource department has officers who are knowledgeable to deal with these issues. Mr Hookoom also produced a letter dated 10 April 2015 from the *Irrigation Authority* (Document E).

Mrs Yajwantee Dulthummon, Senior Human Resource Officer at the *Irrigation Authority*, was called on behalf of the *Respondent*. The *Disputant* was issued a letter of warning dated 9 January 2013 following the views of the Head of Operations and Maintenance after an inquiry into the refuelling of van 165 JN 08 on 22 October 2012 which affect irrigation operations. The *Disputant* submitted his explanations upon being asked by the Officer-in-Charge at Stage 1 sub-office. She remitted the matter to Mr Kong Thoo Lin, Head of Operation in the Operation and Maintenance Department for enquiry. The latter in turn gave his views to the effect that Mr Ramdour failed in his duties as a driver by not refuelling the vehicle on 22 October 2012 as a result of which irrigation operations were affected as proved by the Irrigation Operation Sheet. At her level, she followed all the procedures in place before issuing the letter of warning.

Upon questions from the Trade Union representative, Mrs Y. Dulthummon maintained that an inquiry was carried out by the Head Office. Mr Ramdour was not, however, called during the inquiry nor was he queried. She received instructions that as the *Disputant* had failed in his duties, he should be given a warning. The *Irrigation Authority* follows guidelines from the *Employment Relations Act*, procedures in the *Human Resource Manual* and conditions of service as well. The duration of the warning was not stated in the letter nor was the right to appeal the warning mentioned therein. It was an internal warning

which was not passed on to the level of the Board. There is no counselling unit service in her organisation but they are people who can give advice and explain precautions to be taken.

The Human Resource Officer at the *Irrigation Authority* also added that the person was allowed to explain in his letter what happened exactly; and that there was only one enquiry following which they receive a report in the human resource department. She confirmed that the practice at the *Irrigation Authority* is as what is stated in the letter dated 10 April 2015. Referring to the *Act*, she stated that the duration of the warning would be 6 months and that the warning is not valid as Mr Ramdour has not had any adverse report.

Mr Vinaye Thakoor, Divisional Irrigation Support Officer at the *Irrigation Authority*, was also called on behalf of the *Respondent*. He stated that the *Disputant*, as Driver, works under the supervision of the Field Supervisor on site. The work consists of shifts – 6 am to 1 pm and 1 pm to 10 pm – and three teams (A, B, and C) operate according to a roaster. On a day, two teams normally work with the second shift team being off the following day resuming duty on the first shift on the day after. The Roaster is prepared by the Irrigation Operation Officer on a monthly basis, given to the Irrigation Supervisor and is also affixed in the Supervisor's Office. He went on to state that there is a filling station, operated by the Storeman in presence of the Higher Store Officer, on the premises since 1986 and that as per practice, refuelling is done on Mondays, Wednesdays and Fridays between the transition shift times from 1230 to 1330 hrs. The Drivers have the duty to refuel the vehicles or the tractor being in use with the authorization of the Irrigation Supervisor; the Storeman refuels the van and relevant entries are made in the Store Requisition Form which is then signed by the Irrigation Supervisor. He added that if refuelling is not done at the right time, shortage of fuel might lead to irrigation sites being closed all the year or irrigation operation starting on the site late, at the expense of the planting community who are penalized.

With regard to the refuelling incident of the 22 October 2012, he was contacted on Wednesday, the 24th of October at around 8 am by the Higher Stores Officer Mr Jatoo for

the need to refuel van 165 JN 08 and he requested the latter to refuel the van. He received a report, the Progress of Irrigation Operations (produced as Document D), on the same day to the effect that there was a lateness to start irrigation day in the morning. The report, in relation to vehicle 165 JN 08, stated that there was no fuel in the van and that operation started at 9 am as per the Irrigation Record Sheet (produced as Document C), which also showed that only 7 poses had been done in zones A and B. Depending on the handle of rotation of the sprinklers fixed on the hydrants, 12 to 16 poses are normally done by a shift comprising of a field supervisor, a driver and one *irriguer*.

Following receipt of the report, he sent a letter to the driver Mr Ramdour on the 25th of October asking him why the van was not refuelled during the second shift when he resumed duty on 22nd of October 2012. The van was not used during the first shift on the 22nd and Mr Ramdour was the first driver who used the van on the day at 1300 hrs and returned same at 1900 hrs as per the vehicle log book. The vehicle was next used on the night of the 22nd by the night watchman Mr K. Boodhoo from 1900 hours to 6 am the following day on roaming patrol to keep watch on electric cables exposed to vandalism, as per current practice. Once the used vehicle is free, it can be used by other people as well; no vehicle is reserved specifically for one team. Everybody concerned is aware of this practice. On the next day, the 23rd, the vehicle was used by a driver Mr Jeeneea and a Field Supervisor Mr Mohita working in Blocks 2 and 3 checking pipe works from 13.15 hrs to 20.30 hrs. No refuelling was done on the said two days. On the 24th, the vehicle was used by the *Disputant*, the Field Supervisor Mr Manikon and *Irriguer* Mr R. Beejadar after having left following refuelling. The log book, copy of which he produced (Document G), through oversight shows that the vehicle left at 6 am. He also produced a copy of the Fuel Requisition Form (Document H) showing that vehicle 165 JN 08 was refuelled at 08.35 hrs on 24th of October 2012 upon a request made by the Irrigation Supervisor Mr Beerbul. The said vehicle was last fuelled on Friday 19th October 2012 by driver Mr Bhangchee during the first shift at 12.37 hrs, as per a Fuel Requisition Form (produced as Document J). The vehicle ran over 500 kilometres as from when it was fuelled on Friday, the 19th. According to him, 70 litres of fuel which is the maximum capacity of the vehicle is not enough for 500

kilometres taking into account the average consumption of the vehicle and its use which makes it fuel consumption a bit higher.

Mr Thakoor received a reply from Mr Ramdour, which he submitted to the Head of Operation and Maintenance Department Mr Kong. He had also sent the report from Mr Beebul to the Supervising Officer on Block 2 Mr Beejan, who did not reply. He therefore acted on the report in his possession and sent same to the Head of Department. He is aware that the Head of Department had recommended the HR Section to take disciplinary action on the matter. He also stated, in referring to the scheme of duties as annexed to the *Disputant*'s statement of case, that the Vehicle Controller is not directly involved in the process of fuelling of the vehicle not being in the office at times when the fuelling is done. The Controller controls fuelling and draws attention to anomalies which to his (Mr Thakoor's) knowledge, there have been several leading to corrective measures. He produced a certified copy of a compilation of Fuel Requisition Forms for the year 2012 (Document K). Referring to the aforesaid forms, he stated that out of thirty three items, on twenty days fuelling was done on Mondays, Wednesdays and Fridays. According to him, the Drivers including Mr Ramdour are aware of this practice as during the 13 years that he has worked in the North, it is the only case of disruption of irrigation due to fuelling he has ever received.

Upon questions from the Trade Union representative, Mr Thakoor further stated that on the 24th, the vehicle was fuelled with 65.5 litres of diesel. He could not say whether the Driver working on Tuesday, the 23rd of October, needed to fuel the vehicle as no report for refuelling was made for the aforesaid date. He also clarified that he is convinced that Mr Ramdour could have done the refuelling before taking the 2nd shift on the 22nd of October 2015.

ISSUE OF JURISDICTION

The *Respondent* has in its written submissions reiterated its objection to the jurisdiction of the Tribunal to hear the present matter as referred on the first item of the dispute. The gist of the submission of the *Respondent* are to the effect that the Tribunal can only be referred a labour dispute as defined under *section 2* of the *Act*. According to a ruling of the Tribunal in *Boolakee v Central Electricity Board (ERT/RN 78/2010)*, it has been submitted that the definition given to a labour dispute should be restricted to the number of issues listed in *section 2* of the *Act*. Reference has also been made to *section 71* of the *Act* wherein the jurisdiction of the Tribunal is excluded in relation to any labour dispute which is within the exclusive jurisdiction of the *Industrial Court*. Reliance was also placed on a judgment of the *Industrial Court* in *Nabeebokus v Air Mauritius (2009 IND 40)* wherein it was considered whether a letter of warning issued against the employee was warranted.

It must be recalled that the jurisdiction of the *Industrial Court* is established under *section 3* of the *Industrial Court Act*. This was held by the *Supreme Court* in *Georges Mademaine & Ors v Scott Granary Company Ltd* [*2009 MR 184*], which was an appeal involving the termination of employment of Dockers who claimed to have been under continuous employment with the company and to have been dismissed without justification under the then *Labour Act*, as follows:

> *The jurisdiction of the Industrial Court is provided for in the Industrial Court Act. Section 3 of the said Act confers upon the Industrial Court "exclusive civil and criminal jurisdiction to try any matter arising out of the enactments set out in the First Schedule, or of any regulations made under those enactments, and with such other jurisdiction as may be conferred upon it by any other enactment".*
>
> *The Labour Act, which forms the basis of the appellants' claim, is listed in the First Schedule and Section 3 of the Labour Act stipulates that "subject to any other enactment, this Act shall apply to every agreement".*

It may be noted that the *Employment Rights Act*, which has repealed and replaced the *Labour Act*, is now listed in the *First Schedule* of the *Industrial Court Act*, among the various other enactments over which the aforesaid *Court* has exclusive civil and criminal jurisdiction.

With regard to the issue of whether the Tribunal has jurisdiction in the present matter, it must be borne in mind that the present dispute has been referred for arbitration to the Tribunal by the *CCM*. Prior to this referral, the matter was reported to the President of the *CCM* on 20 February 2014. Upon the reporting of the dispute by any party thereto, the President of the *CCM*, pursuant to *section 65* of the *Act*, has a discretion to reject the report of same where he is of the opinion that the dispute is not a labour dispute among the other grounds listed in the aforesaid section. However, the record does not state whether any objection was raised before the *CCM* in relation to the reporting of the present dispute.

The meaning of a labour dispute under the *Act* for the purpose of the present matter reads as follows:

> *"labour dispute" –*
>
> > *(a) means a dispute between a worker, or a recognised trade union of workers, or a joint negotiating panel, and an employer which relates wholly or mainly to wages, terms and conditions of employment, promotion, allocation of work between workers and groups of workers, reinstatement or suspension of employment of a worker;*

The *Disputant* being an employee of the *Respondent*, it is pertinent to consider the *Irrigation Authority Act*, namely *sections 10* and *11* of same, which relate to the appointment and conditions of service of the staff at the *Irrigation Authority*. These provisions read as follows:

10. Appointment of staff

(1) The Board may employ, on such terms and conditions as it may determine, such staff as may be necessary for the proper discharge of its functions under this Act.

(2) All staff of the Authority shall be under the administrative control of the General Manager.

11. Conditions of service of staff

The Board may make provision, in such form as it may determine, to govern the conditions of service of the staff of the Authority, and in particular, to deal with—

(a) the appointment, dismissal, discipline, pay and leave of, and the security to be given by, staff;

(b) appeals by staff against dismissal and other disciplinary measures.

Section 11 (a) of the *Irrigation Authority Act* clearly states that the Board of the *Authority* may make provision to govern the conditions of service of its staff and in particular to deal with matters of discipline among other conditions of service as have been cited. It is thus clear that matters relating to the discipline of the employees at the *Irrigation Authority* do fall within '*terms and conditions of employment*' as is included under the meaning of a labour dispute in the *Act*.

The case of *Nabeebokus v Air Mauritius* (*2009 IND 40*) relied upon by Counsel for the *Respondent* does not find its application in the present matter. Although the case related to an order for a warning to be declared null and void, there was no issue as to the jurisdiction of the *Industrial Court* as per the judgment produced. The facts of the matter, moreover, related to the explanations of the plaintiff before a management committee on allegations made against him.

Counsel for the *Respondent* has also relied on a ruling of the Tribunal in the matter of *M. Boolakee and The Central Electricity Board* (*ERT/RN/78/2010*) where a dispute was referred relating to disciplinary sanctions and/or the conclusions of a disciplinary committee set up to examine charges against the *Disputant*. The following may be noted from this ruling:

> *It thus appears that the disciplinary procedure provided in the internal regulations became part of the terms and conditions of employment of the Disputant.*
>
> *…*
>
> *The Tribunal finds that here the contractual disciplinary procedure may form part of the terms and conditions of employment of employment of the Disputant (**vide The Food and Agricultural Research Council v Heerasing 2003 SCJ 104**). However, even then the disciplinary sanctions and/or conclusions of a disciplinary committee need not necessarily fall within the jurisdiction of the Tribunal.*

Although the ruling referred to by Counsel for the *Respondent* does not exclude disciplinary procedures from the meaning of a labour dispute under the *Act*, a distinction must be drawn on whether the Tribunal would be habilitated to hear matters relating to the procedures *per se* and/or whether it may review any sanction that would result from the disciplinary process.

In this context, it would be appropriate to consider whether the sanction resulting from the disciplinary proceedings is a matter which falls under the provisions of the *Employment Rights Act 2008* and would therefore be within the exclusive jurisdiction of the *Industrial Court* (vide *section 71 (a)* of the *Act* and *section 3* of the *Industrial Court Act*).

On the facts of the present matter, it has not been disputed that Mr Ramdour was given a warning by letter from his employer dated 9 January 2013 following explanations

sought by the latter regarding a refuelling incident of a vehicle which affected irrigation operations on 24 October 2012.

Although the *Respondent* has averred that an inquiry was carried out into the refuelling incident, there was no disciplinary committee held prior to the issuance of the warning which, as per the letter itself, was based on the explanations submitted by the *Disputant* and were deemed not be satisfactory.

It cannot also be overlooked that the *Respondent* follows the provisions of the *Human Resource Management Manual*, the *Pay Research Bureau Report 2013* and procedures laid down in the *Act* as per a letter dated 10 April 2015 produced by its General Manager during the hearing of the present matter. The relevant aspect of this letter states as follows:

> *We acknowledge receipt of your above letter and wish to inform you that IA follows guidelines as prescribed in the HRM Manual (February 2011) of the Ministry of Civil Service & AR and conditions laid in the PRB Report 2013 as well as procedures laid down in the Employment Relations Act 2008 in respect of Disciplinary Procedures and Recruitment and Promotion Procedure of Employees.*

The evidence of the Senior Human Resource Officer of the *Respondent* has confirmed that procedures in the *Act* are followed in relation to disciplinary matters. She furthermore stated that the warning was for a period of six months and that it is no longer valid in the absence of any adverse report against the *Disputant*.

The nature of the disciplinary procedures to be found in the *Fourth Schedule* of the *Act* has been discussed by *Dr D. Fok Kan* in *Introduction au Droit du Travail Mauricien*, *2ème édition*, as follows:

Sauf en cas de licenciement, aucune procédure disciplinaire obligatoire n'est prévue par la loi. Cette absence de réglés législatives est toutefois tempérée par les dispositions du Code of Practice de l'EreA.

Ce Code préconise en effet l'établissement par l'employeur, en collaboration avec les syndicats concernés, d'une procédure disciplinaire formelle, sauf éventuellement pour les petites entreprises où il y a un contact personnel entre employeur et employés. Ce document précisera ainsi les faits qui seront sanctionnés par un avertissement, une mise à pied ou un licenciement, le niveau d'autorité habilité à prendre des sanctions disciplinaires, la procédure permettant à l'employé de faire connaître sa version, le droit de représentation de l'employé par un officiel de son syndicat, un droit d'appel au sien de l'entreprise et éventuellement un arbitrage indépendant.

Hence, it is clear that the disciplinary process that has been followed emanates from the *Act* as was the sanction that was meted out to the *Disputant* in the letter dated 9 January 2013. The procedures and sanction clearly do not fall within the purview of the *Employment Rights Act* and nor is the dispute a matter of dismissal under same. The *Industrial Court* cannot therefore be said to have jurisdiction in this matter by virtue of *section 71* of the *Act* and *section 3* of the *Industrial Court Act*.

The Tribunal does thus have the necessary jurisdiction to hear the present dispute on the reasonableness of the warning that was issued to the *Disputant* on 9 January 2013 and on whether same should be withdrawn or otherwise on the terms of reference referred.

MERITS OF THE DISPUTE

The *Disputant*, in accordance with the terms of reference of the present matter, wishes to know whether the warning issued to him by his employer on 09 January 2013 is unreasonable; and whether the warning should be withdrawn or otherwise.

The Divisional Irrigation Operation and Maintenance Officer at the *Irrigation Authority*, by way of letter dated 25 October 2012 (Document B), stated that '*it has been noted that van 165 JN 08 was not refuelled on Monday the 22nd of October 2012 during the second shift*' and that '*normal irrigation operation on Wednesday the 24th of October 2012*' was affected. In the letter, Mr Ramdour was asked to give any explanation if he considered that disciplinary action should not be taken.

It has been not been disputed that there was a fuelling incident involving van 165 JN 08 on Wednesday, 24 October 2012 which delayed irrigation operations during the first shift on the day. The van was being driven by the *Disputant*. Mr Ramdour had previously driven the vehicle on Monday, the 22nd of October during the second shift. Prior to that, he used the vehicle on Friday, 19th of October. He also stated having worked on Sunday, the 21st of October.

The evidence adduced, as per the bundle of fuel requisition forms produced (Document K) has shown that the vehicle 165 JN 08 was fuelled on Friday, 19th October 2012 before the end of the first shift with 34 litres of diesel. The said vehicle was thereafter filled on Wednesday, 24th October 2012 at 0835 hrs with 65.5 litres of fuel. It may also be noted that between the two aforementioned refuelling, the vehicle drove a distance of 577 kilometres as per the speed metre reading inserted on the fuel requisition forms.

The evidence adduced by Mr Ramdour is also pertinent in this matter. His version is to the effect that the vehicle was filled to between 3/4 and 9/10th of its fuel capacity when he took use of same during the second shift on Monday, 22nd October 2012. He returned the van at 9 pm with the same level of fuel, following which he returned to his home. He resumed work on the following Wednesday at 6 am for the first shift. This was when he noticed that the vehicle's fuel was low and he informed the Supervisor of the need to fuel the vehicle.

The *Disputant* also stated that it is possible that the vehicle was driven on Tuesday. The extract of the vehicle log book produced (Document G) has also given some credence to the version of the *Disputant*. It has shown that he drove the vehicle on Monday, 22nd October 2012 from 1300 to 1900 hrs for a distance of 37 kilometres. On the same date, the vehicle was also used during the night from 1900 to 0600 hrs the following day during which it drove for a distance of about 68 kilometres. On Tuesday, 23rd October, the log book also shows that the van was used between 1318 and 2000 hrs over a distance of about 50 kilometres. In all, the extract of the log book adduced has shown that the van 165 JN 08 drove over a distance of 156 kilometres between Monday and Tuesday, before being refuelled with 65.5 litres of diesel in the morning of Wednesday, 24th October 2012. It must not also be overlooked that the van was also fuelled on Friday, 19th October with a speed metre reading of 90547 kilometres at 1237 hrs before being used for the second shift by Mr Ramdour.

Mr Beerbul has stated that if a vehicle has no fuel, a request has to be made for refuelling; and that on 24th October 2012, the vehicle started work on 0840 hrs. Mr Thakoor confirmed that the vehicle was used on the night of the 22nd October by the night watchman on roaming patrol from 1900 to 0600 hrs. It is not the practice that a vehicle is reserved for specifically one team and can be used by another team if free. The vehicle was used by another driver from 1315 to 2030 hrs on Tuesday, 23rd October before Mr Ramdour took up the first shift on Wednesday, 24th October.

It would therefore follow to reason that when the *Disputant* took the vehicle on Monday to drive same for the second shift, it would not be possible for the van not to have been refuelled after having driven at a distance of about 500 kilometres during the weekend. The evidence has borne out that van 165 JN 08 was fuelled on Friday, the 19th October. Mr Takoor in his evidence stated that with a fuel capacity of 70 litres, the van would not have enough fuel to drive over such a distance. If the version of the *Disputant* to

the effect that he resumed driving of the vehicle filled with up to 90 per cent of its fuel capacity on Monday is to be believed, it is very much possible that the van was fuelled during the weekend; however, there is no fuel requisition form to show for this.

In considering whether the vehicle should have been refuelled on Monday, 22nd October so as not to have delayed irrigation operations on the following Wednesday, it cannot be discarded that the vehicle was used during the night of the 22nd October to the following morning by night watchmen on duty and during the second shift between 1318 and 2000 hrs on Tuesday. The evidence has revealed that the van drove over a distance of 118 kilometres from the time Mr Ramdour left same at the end of the second shift on Monday evening.

Even if it were to be said that the *Disputant* should have refuelled the vehicle on Monday, 22nd October, prior to assuming the second shift, the distance over which it was thereafter driven without having been refuelled in between reasonably leads to the conclusion that there would be a lack of fuel in the van for the start of the first shift of irrigation operations on Wednesday.

Although Mr Takoor did state that it is the practice at the *Irrigation Authority* for refuelling to be done on Mondays, Wednesdays and Fridays during the shift transition times of 1230 to 1330 hrs, the Supervisor Mr Beebul also stated that if a vehicle needs to be fuelled, a request has to be made for same. Moreover, there has been nothing adduced in writing to this effect.

It would be therefore be safe to conclude that, as per the evidence adduced before the Tribunal, Mr Ramdour was not completely at fault in not refuelling the van during the second shift on Monday, 22nd October which led to normal irrigation operations being affected on Wednesday, 24th October 2012.

The Tribunal has also noted that during the course of the proceedings that the disciplinary proceedings were brought under the procedures laid down in the *Act* as stated in the letter dated 10 April 2015 produced by the General Manager of the *Irrigation Authority*. The nature of the disciplinary procedures as set in the *Act* need to be considered. It is not disputed that the procedures fall under the *Code of Practice* to be found in the *Fourth Schedule* of the *Act* which as per *section 35* of the *Act* is meant, *inter alia*, to provide '*practical guidance for the promotion of good employment relations*'.

Likewise, it would be pertinent to note that *Dr D. Fok Kan* (*supra*) has also stated the following on the nature of the *Code of Practice* to be found in the *Act*:

> *Il convient toutefois de rappeler que les dispositions du Code of Practice ne sont pas obligatoires. Du point de vue de la loi, il n'y a pas ainsi de procédure disciplinaire sauf en cas de licenciement. Dans les entreprises ou il y a un syndicat reconnu la procédure disciplinaire est souvent prévue dans un 'procedure agreement' conclu entre l'employeur et le syndicat.*
> (The underlining is ours.)

The evidence in the present matter has borne out that there is no procedure agreement establishing any disciplinary procedure for the employees of the *Respondent* body. The written warning that was given to the *Disputant* was made in pursuance of the guidelines of the *Code of Practice*, notably under *paragraph 158*. This reads as follows:

> *Management may have recourse to a written warning for more serious infringement. The worker shall be informed of the reason for the warning and notified that a final warning would be given if there is no improvement after 6 months. He shall be informed of his right to appeal. The warning shall be disregarded after 6 months if the worker improves his conduct or performance.*

The Trade Union representative has been at pains to highlight instances where the guidelines in the *Code of Practice* have not been followed in contesting the reasonableness of the warning given to the *Disputant*. The material aspect of the letter dated 9th January 2013 reads as follows:

> *We wish to inform you that we have taken into consideration your explanations submitted in the above letter and are not satisfied with same.*
>
> *…*
> *Please note that refueling of the van registration no. 165 JN 08 was not done on 22.10.12 and as a result of this irrigation operation was affected on 24.10.12.*
>
> *You are therefore, being given a warning for your irresponsible attitude at work and you are apprised that in future any similar act on your part may entail severe disciplinary action.*

The aforesaid letter, it may be noted, has not informed the *Disputant* of his right of appeal as has been provided in the guidelines set in *paragraph 158* of the *Code of Practice*. Nor was he informed that, upon disciplinary action being proposed as per letter dated 25 October 2012, that the disciplinary procedures would be under the *Code of Practice* as set in the *Act*. This omission cannot be taken lightly inasmuch as the guidelines do provide, at *paragraph 141*, that '*Management shall make it known to every worker disciplinary rules and the agreed procedures*'.

The evidence has also borne out that no formal hearing was held prior to the *Disputant* being issued a warning. This is contrary to what has been provided for by the *Code of Practice* in cases of alleged misconduct as has been amply stated in *paragraph 149* of the *Code of Practice*:

> *Formal hearing shall be held in cases of alleged misconduct.*

In this context, it would be appropriate to note what has been stated in *paragraph 147* of the *Code of Practice*:

> *When a disciplinary matter arises, the relevant supervisor or manager shall first establish the facts and, where appropriate, obtain statements from the witnesses before deciding to drop the matter, arrange for informal counselling or initiate formal disciplinary proceedings.*

The evidence in the present matter has borne out that the *Disputant* was given a warning following the explanation he submitted in writing in reply to a correspondence dated 25th October 2012 from the Divisional Irrigation Operation and Maintenance Officer. The *Disputant* was asked as follows:

> …
> *2. As it is proposed to take disciplinary action against you, I would welcome any explanation from you if you consider that such action should not be taken.*
>
> *3. Would you let me have your explanations by the …01.11.2012… at latest, otherwise it will be assumed that you have none to offer, and in that case disciplinary measures will be taken against you.*

Furthermore, the guidelines of the *Code of Practice* also provide that a distinction in the disciplinary rules shall be made between serious and minor cases of misconduct (vide *paragraph 146*). From a perusal of the letter dated 9th January 2013, it is not stated for what kind of misconduct he was given a warning nor was he told whether the disciplinary action proposed to be taken against him relates to a case of serious or minor misconduct. It must also be noted, pursuant to *paragraph 154 (g)*, that disciplinary procedures shall '*indicate the disciplinary actions to be taken*'.

The Trade Union representative has also highlighted other instances in referring to the *Code of Practice* whereby he believes that the *Disputant* was not fairly treated by the

process leading to the warning. He referred notably to *paragraph 140*, wherein it is the duty of Management to ensure that '*fair and effective arrangements exist for dealing with disciplinary matters*' which shall be agreed upon with the concerned trade unions.

Furthermore, *paragraph 72* of the *Code of Practice* provides that every worker shall be issued a handbook, in every enterprise of 100 or more workers, which includes *inter alia* disciplinary, grievance and dispute procedures. The General Manager of the *Respondent* did however clearly state that there is no handbook in relation to disciplinary procedures at the *Irrigation Authority* although the procedures of the *Human Resources Management Manual* are being followed; and that no procedure agreement exists as the trade unions concerned have refused to sign same.

The Human Resource Officer stated that the warning is no longer valid being for a duration of six months in the absence of any adverse report. Although this period may be according to *paragraph 158* of the *Code of Practice*, there is nothing in writing to this effect nor was this confirmed by the *Disputant* or his representative during the course of the hearing.

The Tribunal cannot, having considered the facts of the refuelling incident as well as the procedure followed which led to the sanction, conclude that the warning issued to Mr Ramdour was reasonable. The Tribunal can only find that the warning must therefore be withdrawn.

In the best interests of good and harmonious employment relations, it would be to the advantage of the employer and its employees to agree on established procedures in dealing with disciplinary matters. It is not in the interest of either party to be left in the dark and be sanctioned unnecessarily in clear breach of guidelines which are supposedly being followed within the organisation. It must be recalled that the success of an undertaking lies

within the joint responsibility of management and workers and the trade unions representing them.

The Tribunal therefore awards accordingly in favour of the *Disputant*.

(Sd) Shameer Janhangeer
(Vice-President)

(Sd) Ramprakash Ramkissen
(Member)

(Sd) Jay Komarduth Hurry
(Member)

(Sd) Khalad Oochotoya
(Member)

Date: 23rd September 2015