# EMPLOYMENT RELATIONS TRIBUNAL

# AWARD

**Consolidated cases**

**ERT/RN 132/15, 133/15, 134/15, 135/15, 136/15, 137/15, 138/15, 139/15, 140/15**

| | | | |
|---|---|---|---|
| **Before:** | **Indiren Sivaramen** | **-** | **Vice-President** |
| | **Esther Hanoomanjee** | **-** | **Member** |
| | **Rajesvari Narasingam Ramdoo** | **-** | **Member** |
| | **Renganaden Veeramootoo** | **-** | **Member** |

**In the matters of:-**

**ERT/RN 132/15** **Mr Jean Clenson Grandcourt (Disputant No 1)**

**And**

**Air Mauritius Ltd (Respondent)**

**ERT/RN 133/15** **Mrs Jayashree Devi Sooprayen (Disputant No 2)**

**And**

**Air Mauritius Ltd (Respondent)**

**ERT/RN 134/15** **Mr Jean Paul Kwet On (Disputant No 3)**

**And**

**Air Mauritius Ltd (Respondent)**

**ERT/RN 135/15** **Mr Sebastien Leong Lone (Disputant No 4)**

**And**

**Air Mauritius Ltd (Respondent)**

**ERT/RN 136/15** **Mrs Yannique Marie Christina Limock (Disputant No 5)**

**And**

**Air Mauritius Ltd (Respondent)**

**ERT/RN 137/15** **Mrs Marie Carole Benjamine Luchessi (Disputant No 6)**

**And**

**Air Mauritius Ltd (Respondent)**

**ERT/RN 138/15** **Mrs Marie Daniella Agathe (Disputant No 7)**

**And**

**Air Mauritius Ltd (Respondent)**

**ERT/RN 139/15** **Mrs Anick Marie Michele Vonmally (Disputant No 8)**

**And**

**Air Mauritius Ltd (Respondent)**

**ERT/RN 140/15** **Mr John Kurt Allas (Disputant No 9)**

**And**

**Air Mauritius Ltd (Respondent)**

**i.p.o Air Mauritius Staff Association (Co-Respondent)**

The above nine cases have been referred to the Tribunal for arbitration in terms of Section 69(7) of the Employment Relations Act 2008 (the "Act"). The Disputants and Respondent were assisted by Counsel. All the cases which raise the same issue have been consolidated following a motion made by counsel for Disputants which was not objected to. It is agreed by Counsel for Disputants and Respondent that all the Disputants form part of the bargaining unit of Co-Respondent. Co-Respondent was thus joined as a party in the present matter in the interest of justice following an order from the Tribunal. The terms of reference are the same in all the cases and read as follows:

*"Whether a combined duties allowance representing 15% to 25% of salaries earned should be paid to me with effect from 8 December 2011".*

Mr Allas deposed before the Tribunal on behalf of all the Disputants. He stated that as Operations Officer, he does many duties such as selling air tickets at the office, dealing with cargo, registering of passengers, luggage service and load control. He referred to the levelling agreement entered into between Respondent and Co-Respondent. Each job in a unit would have a specific job description in addition to the generic specification applicable to the job holder. He averred that in Mauritius, Respondent's employees are given duties in relation to one category of function and level only. In Rodrigues, they have to fulfill duties pertaining to different categories of functions and levels.

Mr Allas averred that Disputants Nos 2 and 3 who are at level 5 have to assume the duties of Duty Manager at the airport. He and Disputants Nos 1, 5, 6, 7 and 8 are at level 3 but are called upon to do load control which would be at level 4 but also other duties such as luggage service, registration and boarding of passengers. Disputant No 4 is at level 1 but has to do duties pertaining to level 4 such as load control or level 3 such as issuing of air tickets and luggage service. Mr Allas also referred to and produced a copy of a collective agreement between Respondent and Co-Respondent (Doc B). He stated that representations were made since October 2011 for them to be paid a combined duties allowance. However, in the Memorandum of Understanding (MOU) signed on 8 December 2011 between Co-Respondent and Respondent, there is

no mention of combined duties allowance for staff in Rodrigues. Mr Allas then referred to a meeting which was held on 19 May 2014 among Mr Puddoo, the then Executive Vice-President, Human Resources and Organization Development of Respondent, Mr Beeharry-Panray, Manager Human Resources, Mrs Biram, Manager Rodrigues and representatives of Co-Respondent and of the Union of Employees of Air Mauritius Limited (UEAML) and himself among others. Mr Puddoo after hearing the parties made a "without prejudice" proposal for Rodrigues staff but this offer was however turned down by representatives of staff present. The disputants then individually reported the disputes to the Rodrigues Commission for Conciliation and Mediation and the cases were eventually referred to the Tribunal.

Mr Allas adduced evidence in relation to the different rates at which the allowance was being claimed by each respective disputant. In relation to other allowances, he stated that the COLA for Rodrigues applies only to Disputants No 1 and 8. He averred that night duty allowance, overtime and extra pay are similar to what apply in Mauritius. He added that the contracts of employment of eight of the disputants are prior to the Collective Agreement of 2011 and seven disputants have contracts of employment which are prior to the Levelling Agreement of 2004. Mr Allas averred that the peak period in Rodrigues can be more than six months. In cross-examination, he accepted that in his contract of employment, his duties have been categorized under 'Head Office' and 'Airport'. He is doing combined duties since 2003 and the matter was first raised in a meeting in October 2011. The disputes were finally reported to the Rodrigues Commission for Conciliation and Mediation in March 2015. The union raised the issue for the first time with Management in 2011. He agreed that each Operations Officer in Rodrigues will do some 2 to 3 'cargos' every month. However, he averred that he has to know the whole system of work for 'cargo' to be able to carry out 'cargo' duties. He averred that they do combined duties all the time in their work in Rodrigues.

Mr Allas stated that it may happen that he works only 32 hours in a week according to the roster given to him. He is nonetheless paid for 40 hours of work. During the off-peak season, night duty starts at noon and ends at 8 p.m and during the peak season, night duty starts at 2 p.m and ends at 10.00 p.m. Mr Allas stated that 'unsociable hours' in Rodrigues are different from those in Mauritius. When confronted with the number of load sheets he has to do weekly, Mr Allas reiterated that the case of the disputants is based on the different types of duties they have to perform and not the volume of work. He was not aware if only five manual grade workers out of eleven were deriving a combined duties allowance. Mr Allas agreed that in Rodrigues there were only three levels, that is, levels 1, 3 and 5 whereas in Mauritius there were five levels (levels 1 to 5). He could not understand how the Respondent incurred losses on the Rodrigues route when, according to him, they outdo the 'budget' that is given to them every time.

Mr Allas stated that the Disputants understand that the Respondent has to optimize human resources but added that Respondent should at the same time understand that managing all these systems require a lot of energy and expertise and that the disputants deserve what they are asking.

Mr Kwet On then deposed before the Tribunal and he stated that though he is at level 5, he sometimes has to perform duties which are at a higher level. In cross-examination, he accepted that there were not many flights in Rodrigues but he stated that the volume of work is not directly related to the number of flights.

Mr Beeharry-Panray, Manager, Human Resources, deposed on behalf of Respondent. He stated that the disputes were reported individually to the Rodrigues Commission for Conciliation and Mediation in March 2015. He attended a meeting before the Commission on 15 June 2015. As far as he is aware there was no other meeting after the meeting of 15 June 2015. The Respondent then received a letter dated 9 July 2015 (Doc H) informing him that the matter was being referred to the Tribunal. He averred that the disputants have not sent any letters to the Respondent or to him. The only communication was with the union. There were representations by Co-Respondent with regard to the payment of a combined duties allowance to officers in Rodrigues but management declined to entertain such a request. He produced a copy of a letter sent to the President of the Co-Respondent to that effect (Doc I). Mr Beeharry-Panray stated that with the Levelling Agreement, the different grades then existing in the company were compressed to only five grades. An officer in Rodrigues will join the company at the entry level at level 1. He then benefits from a fast track to move directly to level 3 (and not level 2 as in Mauritius). He however has to get some qualifications to move to level 3. From level 3, the officer may move directly to level 5. He then stated that as per clause 4.11 of the collective agreement between Respondent and Co-Respondent, whatever is provided for in the agreement in terms of salary, perks, conditions of employment is made applicable to employees employed in Rodrigues also. He produced a copy of a procedural agreement existing between Respondent and Co-Respondent (Doc J).

Mr Beeharry-Panray then explained why combined duties allowance is paid only to a few (and not all) of the manual grade employees in Rodrigues. He stated that the Rodrigues route is a route which is not profitable for the last five years since 2011. He stated that the structure of Respondent in Mauritius with the number of flights Respondent has and the types of operations carried out with its 1700 to 1800 workers is not the same as in Rodrigues where Respondent has about 20 workers. The flights in Rodrigues are operated by the ATR which is a small aircraft with a capacity of about 64 to 66 seats. He stated that historically workers in Rodrigues have always been doing

polyvalent duties and that this is specifically mentioned in their respective contract of employment. A copy of the contract of employment of Mr Allas was produced (Doc L).

Mr Beeharry-Panray stated that there are recognised unions at the Respondent and when individual employees report such disputes as in the present case this makes the situation in terms of human resources unmanageable at the Respondent. In cross-examination, Mr Beeharry-Panray stated that whatever exists in any collective agreement which is signed for staff in Mauritius is made applicable in Rodrigues. He agreed that there are only three levels at Rodrigues' station and that this is a direct consequence of the fact that officers are called upon to do combined duties. Mr Beeharry-Panray stated that a without prejudice proposal was made and it was turned down. A copy of a document pertaining to "The Financial Highlights for the year ended 31st of March 2016" was produced (Doc M). In re-examination, Mr Beeharry-Panray stated that levels 2 and 4 did not exist in Rodrigues and only currently a Senior Administrative Staff has been recruited at level 2.

Mrs Biram, Manager at Respondent then deposed and she stated that she is responsible for the station at Rodrigues, that is, the office at Port-Mathurin and all operations at Sir Gaetan Duval airport. She stated that the Operations Officer is responsible for carrying out duties at the head office and at the airport. She listed the duties provided under both headings (Head Office and Airport) in the contract of employment of Mr Allas. Mrs Biram confirmed that in Rodrigues employees are called upon to perform several roles at different levels. Mr Allas, for instance, is at level 3 but has to perform duties pertaining to levels 2 and 4. She stated that the station at Rodrigues is very specific and everyone has to be polyvalent. During the off-peak season, one works at the airport from 9 to 11 and then returns to the office to complete one's eight hours of work. Mrs Biram produced a document showing the number of flights per month over the period 2009 to 2016 (Doc N). She conceded that Load Control requires a lot of concentration and precision but stated that in Rodrigues it is not possible to have someone who will do only load control. She stated that when a plane has left, there is no need to keep an officer at the airport or else the latter would have idle time.

Mrs Biram deposed as to the operations taking place before a plane takes off. Whilst referring to the flight figures for February 2015, she stated that one Operations Officer had done some 8 load sheets per month. She stated that a system whereby the officer doing load control would be doing so every day for 8 hours cannot apply to Rodrigues. She then referred to the specificities of work for Respondent's officers in Rodrigues (shifts, night duty, peak periods, lapse of time between flights, manual workers historically performing extra duties and so on).

Mrs Biram stated that “accounting duties” have been removed from the duties performed by the officers as from September 2010. She discusses revenue budget with her staff but is not aware of the “operational costs” for Rodrigues. Mrs Biram produced a document in relation to the number of flight arrivals and departures (Doc O). Mrs Biram stated that when one compares the number of flights (flying in and out of Mauritius as compared to Rodrigues), it is clear that combined duties is necessary for the operations in Rodrigues. She stated that since December 2015 there are six Casual Customer Service Assistants who perform duties of Operations Officers except for load control, cargo and “litige bagage”.

In cross-examination, Mrs Biram was referred to the “service fee’. She agreed that the revenue budget for 2015/2016 for Rodrigues was Rs 87 million and that they achieved Rs 102 million. She conceded that officers are sometimes required to work four hours on a Sunday or public holiday in two shifts as it would not be proper management to make officers work when there is no flight. She also accepted that the occupancy rate of flights from Rodrigues to Mauritius is one of the highest. However, she added that (normal) seat availability for passengers is only 64 seats per flight.

Mr Seebaluck, an Accountant, then deposed and he confirmed Doc K which gives a summary of the profitability statements for Rodrigues route for the past years. He stated that Rodrigues is a loss making route and that Respondent is operating this flight because it is contributing to the development of Rodrigues. He stated that the profit made for the financial year 2015/16 is an exceptional profit which is related to the low fuel price. He added that the Respondent is forecasting a loss for next year due to increasing fuel price, depreciation of the euro and increased competition. In cross-examination, Mr Seebaluck stated that fuel cost and exchange rate between the euro and the dollar are among the factors which have caused the losses incurred by Respondent on the Rodrigues route to increase during the period 2012/2013 to 2014/2015. He conceded that these factors apply not only to the Rodrigues route. In re-examination, Mr Seebaluck stated that the percentage increase in fixed costs on a yearly basis for Rodrigues outweighs the percentage of incremental increase of total revenue.

The representative of Co-Respondent chose not to depone before us.

The Tribunal has examined all the evidence adduced including the lengthy submissions of both Counsel and the statement made by the representative of the Co-Respondent. The Tribunal has already delivered a ruling in the present matter whereby the Tribunal ruled that preliminary objections (under limbs (iv) to (vi) only) taken by the Respondent were at best premature. The Respondent had reserved his right to raise these objections anew if need be at the hearing as well as his objections under limbs (i) to (iii).

Counsel for Respondent has in his submissions raised the objections which read as follows:

*(i) The Labour Dispute reported does not comply with Section 67 (c) (i) and (ii) of the Employment Relations Act as Disputants have reported their dispute on 08 March 2015 when a Collective Agreement signed with Disputants' Union, the Air Mauritius Staff Association, to which Disputants belong was still in force.*

*(ii) Disputants have failed to comply with the dispute procedures as laid down under subsection (2) of Section 64 of the Employment Relations Act as there has been no meaningful negotiations between Disputants and Respondent and a stage of deadlock reached.*

*(iii) The Rodrigues Commission for Conciliation and Mediation has failed to observe the legal delay set under Section 69 (7) of the Employment Relations Act whilst referring the labour dispute to the Tribunal for arbitration.*

*(iv) The Dispute reported by Disputants on 08 March 2015 claiming that they be paid a combined duties allowance representing 15% to 25% of salaries earned by Disputants with effect from **08 December 2011** fall outside the purview of Para (c) of the "Labour Dispute" under the Employment Relations Act as the dispute is being reported more than 3 years after the act or omission that gave rise to the Dispute.*

*(v) There exists already a Procedure Agreement signed on 08 December 2011 between Respondent and Disputants' Union, Air Mauritius Staff Association (AMSA), effective 01 April 2011 for a period of 4 years which provides that a Collective Dispute (Dispute of Interest) on terms and conditions of employment should not arise within the duration of the Procedure Agreement. Please refer to section 10 of the Procedural Agreement at **Annex 1.***

*(vi) Disputants cannot go "outre et contre" their contract of employment signed with Respondent which specifies clearly the agreed remuneration attached to the duties they are called upon to perform in their respective positions.*

The Tribunal proposes to deal with these objections first before going into the merits of the case if required. Under limb (i) of the preliminary objections, section 67(c)(i) and (ii) reads as follows:

***67. Limitation on report of labour disputes***

*Where a labour dispute is reported to the President of the Commission under section 64, no party to the dispute may report -*

*…*

*(c) while a collective agreement is in force, a labour dispute on matters relating to wages, and terms and conditions of employment which —*
*(i) are contained in the collective agreement;*
*(ii) have been canvassed but not agreed upon during the negotiation process leading to the collective agreement; or*
*(iii) …..*

This section provides for the stage where a labour dispute is reported to the President of the Commission under section 64 of the Act. Counsel for Disputants argued that this point was not taken before the Commission for Conciliation and Mediation and that Respondent instead submitted itself to the jurisdiction of the Commission. There is indeed no evidence on record that any objection in line with section 67(c)(i) or (ii) was taken before the Commission. Section 65 of the Act provides as follows:

***65. Rejection of labour disputes***

*(1) The President of the Commission may reject a report of a labour dispute made under section 64 where he is of the opinion that –*
*(a) the dispute is not a labour dispute or does not comply with section 67;*
*(b) …*

*(2) Notwithstanding subsection (1), the President of the Commission may –*
*(a) reject only that part of a dispute which is not a labour dispute;*
*(b) in the case of a labour dispute which includes a party which is not entitled to be a party to the labour dispute, strike out the name of such party from the report of the dispute.*
*(3) The President of the Commission shall give written notice of any rejection within 14 days of receipt of the report of the dispute to all the parties to the dispute.*

Thus, it is the President of the Commission who may reject a report of a labour dispute where he is of the opinion that the dispute does not comply with section 67. The power of the President of the Commission to reject a report of a labour dispute is subject to the right of appeal granted to an aggrieved party to come before the Tribunal under section 66 of the Act. There is nowhere mentioned that the Tribunal may set aside a dispute which does not comply with section 67 and more particularly where the issue was not raised before the Commission. Section 71 of the Act already provides instances where the Tribunal shall not enquire into a labour dispute and it does not include situations envisaged by section 67(c)(i) or (ii) (above). In light of the referral of the dispute by the Commission to the Tribunal under section 69(7) of the Act, and provided the dispute is a labour dispute and does not fall under section 71 of the Act, the Tribunal has to enquire into the dispute. The preliminary objection under limb (i) cannot stand and the objection is set aside.

Under limb (ii) of the preliminary objections, failure to comply with dispute procedures as laid down under section 64(2) of the Act is being averred. Section 64(2) of the Act reads as follows:

*(2) No dispute referred to in subsection (1) shall be reported, except after meaningful negotiations have taken place between the parties and a stage of deadlock has been reached.*

Here again, this provision applies at the stage when the matter is reported to the Commission and there is nothing to suggest that the issue was indeed raised before the Commission. The President of the Commission may reject the report of the dispute under section 65(1)(d) of the Act where he is of the opinion that the party reporting the dispute has failed to comply with the dispute procedures applicable. For similar reasons given for the preliminary objection under limb (i), the preliminary objection under limb (ii) is also set aside.

As regards preliminary objection under limb (iii), there is again no provision under the Act whereby the Tribunal is granted the power to set aside a labour dispute without even going into the merits of the case on the sole ground that the delay of 7 days mentioned in section 69(7) of the Act would not have been complied with. It is apposite here to refer to section 105(3) of the Act which reads as follows:

*(3) No order, award, recommendation or other decision made by the Tribunal, Commission or the Board, outside the delays provided for in this Act, may be challenged or declared invalid for such reason.*

For the reasons given above, the preliminary objection under limb (iii) is also set aside.

Under limb (iv) of the preliminary objection, Counsel for Respondent is relying on the definition of "labour dispute" under section 2 of the Act. "Labour dispute" is defined under section 2 as follows:

*"labour dispute" –*
*1(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;*
*(b) does not, notwithstanding any other enactment, include a dispute by a worker made as a result of the exercise by him of an option to be governed by the recommendations made in a report of the Pay Research Bureau or a salary commission, by whatever name called, in relation to remuneration or allowances of any kind;*

*(c) does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute.*

Paragraph (c) in the definition has been added by the Employment Relations (Amendment) Act 2013 (Act No. 5 of 2013) and the amendment came into operation on 11 June 2013 (following Proclamation No. 29 of 2013). As per the letters of referral before us (and Doc F), the labour disputes were reported to the Rodrigues Commission for Conciliation and Mediation on 2 March 2015, 8 March 2015, 13 March 2015, 13 March 2015, 13 March 2015, 6 March 2015, 6 March 2015, 13 March 2015, and 13 March 2015 for Disputants Nos 1, 2, 3, 4, 5, 6, 7, 8 and 9 respectively. The disputes were reported to the Rodrigues Commission for Conciliation and Mediation long after the amendment brought to the definition of "labour dispute" on 11 June 2013. At the time each individual disputant reported his dispute, the disputant could only report a "labour dispute" and the Tribunal has jurisdiction only to enquire into a "labour dispute" under section 69(7) of the Act. The Tribunal has only powers granted to it under the Act (and other applicable legislation such as the Employment Rights Act in the case of the Employment Promotion and Protection Division) and cannot hear a dispute which is not a "labour dispute" as defined under the Act. This has to do with the jurisdiction of the Tribunal.

The Tribunal agrees with submissions of Counsel for Disputants that the manner in which the terms of reference have been drafted (that is with an effective date running as from 8 December 2011) is not necessarily conclusive as to whether the disputes are outside the delay contemplated in part (c) of the definition of 'labour dispute'. The Tribunal has however heard all the evidence on record and will bear in mind all the evidence adduced and submissions offered by Counsel on this issue. Counsel for Disputants submitted that one has to ascertain the starting date for the three years' period. He submitted that it is when there is a deadlock in negotiations that the delay of three years starts to run. The Tribunal disagrees with such an interpretation. Section 64 of the Act provides as follows:

***64. Reporting of labour disputes***

*(1) Subject to section 63 and subsections (2) and (3), any labour dispute, whether existing or apprehended, may be reported to the President of the Commission —*
*(a) by any party to the dispute; or*
*(b) by a recognised trade union on behalf of any party to the dispute.*
*(2) No dispute referred to in subsection (1) shall be reported, except after meaningful negotiations have taken place between the parties and a stage of deadlock has been reached.*
*(3) The period of negotiations shall not exceed 90 days from the start of negotiations or such longer period agreed in writing between the parties.*
*(4) During the period when negotiations are being held between parties as specified in subsections (2) and (3), any party may seek the assistance of the conciliation service*

*provided by the Supervising Officer under section 68 with a view to conciliating the parties.*
*(5) Any request for assistance under subsection (4) shall be made not later than 20 days before the expiry of the period of 90 days or such longer period agreed between the parties as specified in subsection (3).*
*……*

The law provides that meaningful negotiations should take place between the parties and only if a deadlock has been reached that a dispute can be reported. The period of negotiations shall not exceed 90 days from the start of negotiations even though there is a proviso that a longer period may be agreed in writing between the parties. Section 64(4) provides for the possibility to seek the assistance of the 'conciliation service' but even then the request for assistance shall be made not later than 20 days before the expiry of the period of 90 days or such longer period agreed between the parties. The emphasis is on the need for celerity for the resolution of labour disputes. These provisions are complemented by other provisions in the Act which impose time delays on the Commission to refer disputes for arbitration and for the Tribunal to enquire into the matter and make any award thereon. The possibility to extend the latter delay is admittedly provided in the Act but it should be used judiciously. The Tribunal fails to see how the delay mentioned in part (c) of the definition of 'labour dispute' (above) may be interpreted as meaning a delay starting as from the deadlock in negotiations. This provision provides clearly as follows:

*(c) does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute*

The delay starts as from "the act or omission that gave rise to the dispute". If there are meaningful negotiations between the parties, the act or omission that gave rise to a dispute in the first place must have already occurred.

In the present case, we need to ascertain when the act or omission that gave rise to the dispute occurred. Mr Allas stated that it was as from 2007-2008 that he realized that he was "overwork" but that they started to talk about it only in 2011. They have had several meetings with Management as they did not want the matter to come all the way up to the Tribunal. In 2007, they did not have contact with the union and it was only in 2011 that they managed to contact the union. According to Mr Allas, the union raised the issue with Respondent in 2011. From the Statements of Case before us, only Disputant No 4 was employed after 2011. Mr Allas explained why they started to talk about it only in 2011 and stated that when they signed their contract of employment, they did not know well how things go about and the system was still manual then. Staff in Rodrigues has been performing combined duties for a long time. The Levelling Agreement has been entered into on 15 December 2004 (Doc A) and the Collective Agreement between Respondent and Co-Respondent has been entered into in December 2011 (for the period 1 April 2011 to 31 March 2015). Also, the meeting held on 19 May 2014 (Doc E) does not affect the date on which the act or omission that gave

rise to the dispute occurred. It is apposite to note that though evidence has been adduced on an offer allegedly made, this was a without prejudice offer made and which was turned down.

From the evidence, it is clear that the act or omission that gave rise to the present dispute occurred at the very least in 2011 (giving even the benefit of the doubt to the Disputants and in line with the terms of reference) except of course in the case of Disputant No 4 who was employed as from May 2012 whereby the delay in his case would start as from May 2012. The disputes were reported to the Rodrigues Commission for Conciliation and Mediation only in March 2015 (well after the 2013 amendment when proper disputes could still have been reported just after the amendment to be within the three years' delay as from 2011) and they were thus reported (except in the case of Disputant No 4) more than 3 years after the act or omission that gave rise to the dispute. The disputes of the Disputants except for Disputant No 4 would thus not be labour disputes under the Act.

The Tribunal will now consider the preliminary objection under limb (v).

Though the disputes may have been reported separately by individual workers, the disputes must at the same time comply with any relevant provisions in the Procedural Agreement and the Collective Agreement. Counsel for Disputants has submitted that the Procedural Agreement is of no concern to the Disputants and binds only the union, that is, Co-Respondent. The Tribunal does not agree with this submission. Indeed, the union when entering into the Procedural Agreement or Collective Agreement, does so because it has a form of legitimacy to act for the whole of the bargaining unit it represents. Because of this legitimacy (characterized by its representativeness), the union (the Co-Respondent in the present case) acts as representative of the interest of that bargaining unit, which is determined according to the common interest of the workers in the unit.

The Tribunal will refer to extracts from the book **The Law of Industrial Relations** by **Dr D. Fok Kan**. At page 85 of his book**, Dr D. Fok Kan** 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 the versions of the notion of representation put forward and adds 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."*

The Procedural Agreement provides for the procedures as to how individual grievances or disputes of collective interests are to be resolved and this apply indiscriminately to all employees in the relevant bargaining unit including the Disputants and the union itself. Any other interpretation will defeat the purpose of having, for example, the procedure in case of individual grievance in the Procedural Agreement.

Articles 6, 7, 8, 9 and 10 of the Procedural Agreement (Doc J) read as follows:

***ARTICLE 6: TERMS AND CONDITIONS OF EMPLOYMENT***

*(1) The terms and conditions of employment of the Employees covered by this Agreement shall be embodied in a separate document signed by accredited representatives of the Company and the Union and will constitute the substantial agreement.*

*(2) Procedure for amendment(s) to the Agreements shall be as described in Article 10 hereunder – Procedure for Collective Disputes of Interest. (underlining is ours)*

*(3) The signatories, on the Union side, shall be the President and the Secretary of the Union.*

## *ARTICLE 7: DEFINITION OF GRIEVANCE AND DISPUTES*

*(1) In this Agreement-*

*"grievance" means a matter adversely affecting or likely to affect an individual employee or a small group of employees;*
*"dispute" or "collective dispute" means a matter affecting or likely to affect a large group of employees or the whole work-force; and*
*"Collective disputes" shall fall into two categories, namely-*
*(a) disputes of rights (legal rights) which relate to the application of existing collective agreements or contracts of employment;*
*(b) disputes of interest (i.e economic disputes) which relate to claims by employees or proposals by Management about terms and conditions of employment.*

## *ARTICLE 8: PROCEDURE IN CASE OF INDIVIDUAL GRIEVANCE*

### *Stage 1: Immediate Superior*

*An employee who has a grievance shall, with or without the assistance of his Union, raise the matter, in the first instance, with his immediate superior who shall endeavor to give an answer within ten (10) working days, subject however to extension by mutual agreement.*

### *Stage 2: Senior Management*

*Where no settlement is reached under Stage 1 above, the Employee may, with or without the assistance of the Union, raise the matter with the office of the Senior Human Resources Representative of the Company who shall again endeavor to give an answer within ten (10) working days, subject to extension by mutual agreement.*

***Stage 3: Grievance transformed into dispute***

*Where, notwithstanding the procedure provided for Stage 2 above, no settlement is reached, the Union may decide to pursue the matter in accordance with the procedure prescribed below for collective disputes of rights.*

## *ARTICLE 9: PROCEDURE FOR DISPUTES OF RIGHTS*

***Stage 1: Management***

*The Union shall raise the matter with the Office of the Senior Human Resources Representative of the Company who shall endeavour to give an answer within ten (10) working days, subject, however, to extension by mutual agreement.*

***Stage 2: Conciliation/Arbitration***

*Where no satisfactory settlement is reached under Stage 1 above:*

*(a) either party may report the dispute to the Minister under section 79 of the Act; or*

*(b) the parties acting jointly may either refer the dispute:-*

- *(i) to the conciliation service of the **Employment Relations Tribunal**, established under section **44** the Act;*
- *(ii) to the **Employment Relations Tribunal** as provided by section 85 of the Act;*
- *(iii) to the Industrial Court; or*
- *(iv) to an independent Arbitrator.*

## *ARTICLE 10: PROCEDURE FOR COLLECTIVE DISPUTES*

*A collective dispute (dispute of interest), on terms and conditions of employment, should not arise within the duration of a Procedural Agreement. It may only arise on the occasion of the renewal of an Agreement on amendments suggested by either party or in the case of a substantial change in circumstances.*

***Stage 1: Proposals for amendments***

*(a) Either party may make proposals to the other party for amendments to an existing Agreement or for a new Agreement on terms and conditions of employment.*

*(b) Negotiations will take place in a spirit of collective bargaining and both parties will endeavour to reach agreement within a period of three months from the exchange of proposals.*

***Stage 2: Conciliation/Arbitration***

*Where no satisfactory settlement is reached under Stage 1 above:*

*(a) either party may report the dispute to the Minister under section 79 of the Act; or*

*(b) the parties acting jointly may either refer the dispute:*

*(i) to the conciliation service of the **Employment Relations Tribunal**, established under section **44** the Act:*

*(ii) to the **Employment Relations Tribunal** as provided by section 85 of the Act;*

*(iii) to the Industrial Court; or*

*(iv) to an independent Arbitrator.*

The above Procedural Agreement takes effect as from 1 April 2011 and remains in force for a period of four years. However, Article 20 of the same agreement expressly provides that the agreement "shall thereafter continue to be in force unless and until either party gives three (3) months notice of amendment or of termination of the agreement in writing." There is no evidence before us to suggest that the Procedural Agreement has been terminated and the Tribunal will thus proceed on the basis that the Procedural Agreement (Doc J) is still in force.

Article 6 of Doc J is very telling. It refers to another agreement, the substantial agreement, containing the terms and conditions of employment of Employees covered by Doc J. The evidence suggests this is Doc B, that is, the Collective Agreement entered into between Respondent and Co-Respondent and signed on 8 December 2011, that is, the same date on which Doc J was made. Part (2) of Article 6 provides clearly that "*Procedure for amendment(s) to the Agreements shall be as described in Article 10 hereunder – Procedure for Collective Disputes of Interest."* Doc B (or even Doc D which is a Letter of Understanding between Respondent and Co-Respondent)

does not provide for any "combined duties allowance" and the provision of any such allowance (if at all reasonable) will entail an amendment of the Collective Agreement existing between Respondent and Co-Respondent.

The procedure for the amendment to the "Agreements" which include the Collective Agreement is clearly laid down, that is, as described in Article 10 of the Procedural Agreement (Doc J). This procedure has not been followed in the present case. This is not a mere procedural defect. The procedure adopted in this particular case goes against the provisions in the Procedural Agreement and undermines a fundamental element of good employment relations which is collective bargaining. The apprehension of Mr Beeharry-Panray as regards the situation in terms of human resources management which may become unmanageable at Respondent if individual workers start reporting such disputes as in the present matter when there are already duly recognised trade unions is not unreasonable. The Tribunal has to see to it that the employer and the recognised trade union bargain in good faith without intervention from third parties. The Code of Practice (Fourth Schedule to the Act) at section 113(f) requires the trade union and the employer to refrain from doing any act that is likely to undermine the bargaining process.

Pursuant to the Procedural Agreement and more particularly Article 7, the Tribunal finds that the disputes though reported individually relate to a collective dispute involving a 'combined duties allowance'. The issue before us affects almost the whole (if not the whole) staff in Rodrigues and cannot be said to be an individual grievance. Moreover, it may have a bearing on any future incumbent in the post of Operations Officer or Chief Operations Officer at Respondent's station in Rodrigues. The procedure laid down in the Procedural Agreement (under Article 10) has not been followed and in light of Articles 6, 7 and 10 of the Procedural Agreement and for the reasons given above, the Tribunal finds that the Disputants cannot proceed with the present dispute before the Tribunal.

This will also be in line with amendments brought to the Act in 2013 in relation to section 67 (even though as discussed earlier on a strict interpretation of that section, it will apply at the stage when the dispute is reported to the President of the Commission) which now provides in its new paragraph (c) the following:

"*Where a labour dispute is reported to the President of the Commission under section 64, no party to the dispute may report -*
*…*

*(c) while a collective agreement is in force, a labour dispute on matters relating to wages, and terms and conditions of employment which —*
*(i) are contained in the collective agreement;*
*(ii) have been canvassed but not agreed upon during the negotiation process leading to the collective agreement; or*

*(iii) have not been canvassed during the negotiation process leading to the collective agreement, except during a period of negotiation for renewal of the collective agreement starting from a date specified in section 55(3A).*

In the light of the conclusions reached under limbs (iv) and (v) of the preliminary objections, the Tribunal does not propose to consider limb (vi) of the preliminary objections.

For all the reasons given above, the dispute is set aside. The Co-Respondent may engage in collective bargaining (in line with existing agreements) with Respondent on behalf of Disputants in relation to the combined duties allowance.

**(sd) Indiren Sivaramen**

**Vice-President**

**(sd) Esther Hanoomanjee**

**Member**

**(sd) Rajesvari Narasingam Ramdoo**

**Member**

**(sd) Renganaden Veeramootoo**

**Member**

**2 September 2016**