

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 30/2017

RULING

Before:

Shameer Janhangeer	Vice-President
Souarain Ramana	Member
Rabin Gungoo	Member
Renganaden Veeramootoo	Member

In the matter of: -

Mr Manish MEEHELAUL

Disputant

and

MAUBANK Ltd

Respondent

The present matter has been referred to the Tribunal by the Commission for Conciliation and Mediation for arbitration pursuant to *section 69 (7)* of the *Employment Relations Act*. The amended terms of reference of the dispute reads as follows:

Unconditional reinstatement as Head of Private Banking Unit with the MauBank Ltd.

The Disputant has submitted an amended Statement of Case in the present matter. The Respondent has raised a threefold preliminary objection in the matter. This reads as follows:

- (a) The Employment Relations Tribunal does not have the jurisdiction to stay a disciplinary committee, i.e. the disciplinary committee initiated by the Respondent against the Disputant;

- (b) The Employment Relations Tribunal does not have the jurisdiction to hear the dispute between the Disputant and the Respondent inasmuch as same constitutes a labour dispute for which the Industrial Court has exclusive jurisdiction to hear and determine;
- (c) The prayers raised under paragraph 4 and paragraph 104 of the Disputant's amended Statement of Case dated the 6th of April 2017 do not fall within the scope of the amended Terms of Reference which has been referred to before the Tribunal and which is primarily concerned with the unconditional reinstatement of the Disputant in his post.

Both parties were assisted by Counsel. Mr K. Trilochun appeared for the Disputant. Mrs V. Bunwaree Goburdhun instructed by S. Mardemootoo, Attorney-at-law appeared for the Respondent. The matter came for arguments on the preliminary objection raised by the Respondent.

Counsel for the Respondent firstly submitted on paragraph (a) of her preliminary objection. She stated that the amended Statement of Case at paragraphs 2 and 3, the prayer has been amended to "*an interim order prohibiting the Respondent from continuing with the disciplinary committee until the final determination of the Tribunal*". The Tribunal does not have jurisdiction to grant as it were a stay of the Disciplinary Committee. She submitted that the Disciplinary Committee is another proceeding with which the Tribunal is not concerned. The law as it stands does not allow the Tribunal to grant an interim order prohibiting the Disciplinary Committee from continuing; it cannot substitute itself to the powers of the Judge in Chambers which is the only avenue to obtain a stay of proceedings of any kind.

Counsel for the Respondent went on to submit that *paragraph 6 (2)(e) of the Second Schedule of the Employment Relations Act* gives the Tribunal the power to grant orders in relation to administrative matters as it allows the Tribunal the make orders to "*... do all such things as are necessary or expedient for the expeditious determination of that matter*". She also referred to *paragraph 7A (2) of the Second Schedule* whereby it is stated that "*Every order of the Tribunal shall be enforced in the same manner as an order of the Industrial Court*" and to *section 9 (2) of the Industrial Court Act* to draw a parallel between the orders envisaged under that paragraph and orders which the Industrial Court is able to grant, which is a series of administrative orders. The Industrial Court does not have to power to grant a stay or an interim

order preventing the hearing of the Disciplinary Committee and neither can to the Tribunal. The prayer of an interim order prohibiting the Respondent from continuing the Disciplinary Committee cannot be granted by the Tribunal.

Under paragraph (b) of the preliminary objection raised, Counsel for the Respondent submitted that the labour dispute has been referred under *section 69 (7)* of the *Employment Relations Act*. The terms of reference deals with the reinstatement of the worker, but when looking into the details of the Statement of Case, what is being asked of the Tribunal is to delve into the procedures of the Disciplinary Committee. From the Statement of Case at paragraph 82 onwards, the Tribunal will be required to look into the unfairness of the Disciplinary Committee, the confidentiality of documents produced or to be produced before the Disciplinary Committee, the failure to communicate documents, the undue delay to bring the employee or continue with the Disciplinary Committee. She submitted that it is not under the cover of reinstatement that one can bring to the Tribunal to determine matters of procedures of the Disciplinary Committee. When referring to the Disciplinary Committee, it refers to *section 38* of the *Employment Rights Act*. The Tribunal has no jurisdiction to hear matters arising from the *Employment Rights Act* except if it concerns matters of reduction of workforce or closing down of enterprise under *section 86 (2)(ba)* of the *Employment Relations Act*.

Counsel for the Respondent went on to state that this matter which concerns the holding of the Disciplinary Committee falls within the exclusive jurisdiction of the Industrial Court referring to *section 3* and the *First Schedule* of the *Industrial Court Act*. The Statement of Case as it is couched does not fall within the terms of reference and is a matter which concerns exclusively the jurisdiction of the Industrial Court.

Under the third limb of her preliminary objection, Counsel for the Respondent submitted that the prayers at paragraphs 4 and 104 of the Statement of Case are asking the Tribunal to interpret and recognise the right of the Disputant to be heard by a Disciplinary Committee according to his contract of employment and more specifically the Code of Conduct and Ethics. It is submitted that when looking at the terms of reference which is unconditional reinstatement as Head of Private Banking, it is not concerned by this at all.

Counsel for the Disputant submitted in reply to the preliminary objections raised by the Respondent. On the issue of jurisdiction, Counsel referred to terms and conditions of

employment and suspension in the definition of a labour dispute in *section 2* of the *Employment Relations Act*. The Disputant has been suspended for more than a year and a half and is claiming that under his contract of employment he has certain rights and those rights need to be respected. One goes to the Industrial Court when his employment is terminated. The Tribunal has to ensure that the rights of the employee are being respected. The Tribunal can interpret collective agreements pursuant to *section 86* of the *Employment Relations Act*. The disciplinary procedure is set in an agreement which forms part of the terms and conditions of employment. One seizes the equitable jurisdiction of the Supreme Court when there is no other avenue. He has come before this Tribunal as that is what the law directs him. The Respondent as any other bank has a completely separate distinct procedure to hear disciplinary matters.

In relation to an interim order to prohibit the Respondent from continuing with the Disciplinary Committee, Counsel for the Disputant has relied on *paragraph 6 (2)(e)* of the *Second Schedule* of the *Employment Relations Act*. He stated that the whole process would be void if the Disputant were to continue to appear before the Disciplinary Committee which takes a decision finding him guilty and what would be of the determination of the Tribunal? The Disputant may have a case and if he were to be subjected to a hearing there, the determination of the Tribunal would be void. It would defeat all purposes if the Tribunal were not to make the interim order until determination of this case to allow the Tribunal to function to stop and stay the Disciplinary Committee. The Disciplinary Committee cannot at the same time be challenged and continuing.

On the question of the reference, Counsel for the Disputant firstly stated that the matter concerns reinstatement and why is it that the Disputant should be reinstated? It is not in a vacuum. The Disputant contends that his rights have been breached. There are different grounds which are stated in the Statement of Case. All the grounds which are in the Statement of case and the amendments are all grounds which would satisfy the Tribunal that the Committee is unlawful.

Counsel for the Disputant also stated that once the Tribunal is referred with a matter under *section 69 (7)* of the *Employment Relations Act*, it is not in the law that a Chinese wall is built around and one has to confine himself to the referral. The jurisdiction of the Tribunal is what is written in the law under *section 86* of the *Employment Relations Act* and what the Disputant is asking for is to interpret the collective agreement. It is wrong to suggest that

because a matter has been referred, you are barred from exercising the powers conferred under *section 86* of the *Employment Relations Act*.

Counsel for the Disputant also enlightened as to under what the Disciplinary Committee was grounded, i.e. under the collective agreement or under the *Employment Rights Act*? He submitted that it is under both. Then if there is anything inconsistent between the contract of employment and the *Employment Rights Act*, the latter prevails. The *Employment Rights Act* prescribes minimum rights. There is nothing in the agreement which has lesser rights as compared to the *Employment Rights Act*. They are rights over and above that is prescribed by law. Both the rights in the *Employment Rights Act* and in the collective agreement are applicable.

In relation to the first limb of the preliminary objection taken by the Respondent, the Tribunal has to determine whether it has the jurisdiction to stay the Disciplinary Committee inasmuch as the Disputant is praying for an interim order prohibiting the Respondent from continuing with the Disciplinary Committee until the final determination of the Tribunal.

It must be borne in mind that the present matter is a referral from the Commission for Conciliation and Mediation under *section 69 (7)* of the *Employment Relations Act*. The matter has been referred to the Tribunal on specific terms of reference, which in this case is “*Unconditional reinstatement as Head of Private Banking Unit with the MauBank Ltd*”.

Upon a referral from the Commission for Conciliation and Mediation, the Tribunal must enquire into the dispute and give its award within the terms of reference of the dispute. Indeed, *section 70 (1)* of the *Employment Relations Act* provides:

70. Arbitration

(1) *Where a labour dispute is referred to the Tribunal under section 63 or 69(7), the Tribunal shall enquire into the dispute and make an award thereon within 90 days of the referral.*

It would be pertinent to note what was stated by the Supreme Court in the matter of *Air Mauritius Ltd v Employment Relations Tribunal [2016 SCJ 103]* with regard to *section 70 (1)* of the *Employment Relations Act*:

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

It cannot be overlooked that the Tribunal's jurisdiction in the present matter is founded under *section 70 (1)* of the *Employment Relations Act* following the referral by the Commission of Conciliation and Mediation and the jurisdiction of the Tribunal is to enquire and to make an award into the labour dispute referred.

The amended terms of reference in the present matter is asking of the Tribunal the unconditional reinstatement of the Disputant as Head of Private Banking Unit at the MauBank Ltd. The Tribunal is not being asked in pursuance to the referral to make orders which are or may be ancillary to the dispute referred to it. The prayer for an interim order emanates from the Disputant's Statement of Case and is not part and parcel of the referral made to the Tribunal of the labour dispute at hand.

It has been argued in the present matter that pursuant to *paragraph 6 (2)(e)* of the *Second Schedule* of the *Employment Relations Act*, the Tribunal has the power to make an interim order. It would be apposite to note what this paragraph provides for:

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

(e) *generally give all such directions and make all such orders, whether interim or permanent, conditional or unconditional, and do all such things as are necessary or expedient for the expeditious determination of that matter.*

Paragraph 6 (2)(e) of the *Second Schedule* of the *Employment Relations Act* empowers the Tribunal to give directions and orders for the expeditious determination of the matter. It must be noted that the matter before the Tribunal is the labour dispute which has been referred to it and which concerns the unconditional reinstatement as Head of Private Banking Unit with the MauBank Ltd of the Disputant. The matter at hand, as per the amended terms of reference, does not concern the Disciplinary Committee nor of any order to prohibit same from continuing.

In view of the jurisdiction of the Tribunal in the present case, the Tribunal cannot therefore make an interim order to prohibit the Respondent from continuing with the Disciplinary Committee until its final determination.

The second limb of the preliminary objection raised avers that the Tribunal has no jurisdiction to hear the present dispute inasmuch as same is a labour dispute for which the Industrial Court has exclusive jurisdiction to hear and determine.

It is trite law that the Tribunal cannot enquire into a dispute which relates to any issue within the exclusive jurisdiction of the Industrial Court. This is amply reflected in *section 71 (a)* of the *Employment Relations Act*, which provides:

71. Exclusion of jurisdiction of Tribunal

The Tribunal shall not enquire into any labour dispute where the dispute relates to any issue –

(a) within the exclusive jurisdiction of the Industrial Court;

What would determine whether the issue is within the exclusive jurisdiction of the Industrial Court? In this regard, *section 3* of the *Industrial Court Act* has provided as follows:

3. Establishment of Industrial Court

There shall be an Industrial Court with 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.

It may be noted that the *First Schedule* to the *Industrial Court Act* includes the *Employment Rights Act* among the various enactments listed in the aforesaid schedule. In *Georges Mademaine & Ors v Scott Granary Company Ltd* [2009 MR 184], the Supreme Court described the jurisdiction of the Industrial Court 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”.

Can it therefore be said that the labour dispute or issue relating to thereof currently referred to the Tribunal falls within the exclusive jurisdiction of the Industrial Court? As per the amended terms of reference, the dispute is *prima facie* concerned with the reinstatement of the Disputant. However, when perusing the Statement of Case of the Disputant, it is clear that most of the averments made by the Disputant relate to the Disciplinary Committee that has been set up against him.

Indeed, if we are to consider the Statement of Case of the Disputant most of the averments made therein relate to the Disciplinary Committee. In this regard, from the "Introduction" section of the Statement of Case, at paragraph 1, it may be noted:

1. *This is a referral from the Commission for Conciliation and Mediation to the Tribunal under Section 69(7) of the ERLA. Following a Labour dispute between the aforementioned parties, the Applicant now seeks the intervention of the Tribunal regarding the Respondent's decision to set up a Disciplinary Committee anew before Mr. ... having discontinued a similar one before another constituted disciplinary Committee.*

The Statement of Case has, as has already been seen, prayed for an interim order to prohibit the Disciplinary Committee from continuing (*vide* paragraph 3 of the Statement of Case). The Statement of Case has lengthily related the provisions of the Code of Conduct and Ethics in relation to the procedure to be followed with regard to a Disciplinary Committee at the bank. The Disputant, in the Statement of Case, has averred how he was first suspended and thereafter cleared before a Disciplinary Committee. The Disputant has in length related his second suspension on 5 October 2015 and how he was called to appear before another Disciplinary Committee by letter dated 25 May 2016. The Disputant has, in no less detail, set out the particulars of the proceedings before this Disciplinary Committee. The Statement of Case has set out, in one section, the "Discontinuance of the Disciplinary Committee" and set averments of the Disputant being called before a new Disciplinary Committee on 17 January 2017. There is a section of the Statement of Case which deals with "Breaches" relating to the Disciplinary Committee divided into headings of *inter alia* "Unfair hearing", "Failure to communicate documents" and "Undue delay".

It should also be noted that most of the prayers set in the Statement of Case relate to the Disciplinary Committee. This may also be sufficiently gleaned from paragraph 4 of the Statement of Case:

4. *I set out my respectful prayers to the Tribunal which are as follows:*
 - a. *To interpret and recognise my rights to be heard by a Disciplinary Committee according to the terms of my contract of employment and more specifically according to the MPCB Code of Conduct and Ethics (CCE) which is a collective agreement.*

- b. *To recognise my right to a fair hearing as part of terms and conditions of my contract of employment with Respondent;*
- c. *Starting a disciplinary committee anew in the circumstances that Respondent is doing is a breach of my contract of employment and the following provisions of the law:*
 - i *Section 10 (8) of the Constitution;*
 - ii *Section 38 (2) of the ERA; and*
 - iii *The Fourth Schedule of the ERLA;*
- d. *My unconditional reinstatement.*

In the present matter, it has not been disputed that the Disciplinary Committee has been set up under the *Employment Rights Act*. Counsel for the Disputant has submitted that the Disciplinary Committee is grounded under both the *Employment Rights Act* and collective agreement. In this regard, paragraph 97 of the Statement of Case may also be considered:

97. *I am advised and verily believe that the Disciplinary Committee is set up under Section 38 (2) (v) of the ERA coupled with the Fourth Schedule of the ERLA falls under the definition of 'other authority' in Section 10 (8) of the Constitution.*

Although the labour dispute referred to the Tribunal concerns the reinstatement of the employee, being given that the dispute relates mainly to the issue of the Disciplinary Committee being held against the Disputant, it would fall within the exclusive jurisdiction of the Industrial Court as the Disciplinary Committee is a matter which arises out of the *Employment Rights Act*.

It has been argued in favour of the Disputant that the Tribunal has the power to interpret collective agreements. To this, it must be borne in mind that the matter before the Tribunal is a referral from the Commission for Conciliation and Mediation and not an application for the interpretation of a collective agreement. It may be noted that pursuant to an application under *section 62* of the *Employment Relations Act*, the Tribunal may give a declaration on the interpretation of a collective agreement.

The Tribunal cannot therefore hear and enquire into the dispute referred between the Disputant and the Respondent inasmuch as same relates to an issue, i.e. that of the Disciplinary Committee, which is within the exclusive jurisdiction of the Industrial Court.

Although the Tribunal has found that it cannot enquire into the present dispute, it shall go on to consider the third limb of the preliminary objection. Under this, the Tribunal is being asked to determine whether the prayers of the Disputant in his amended Statement of Case fall within the amended terms of reference which concerns primarily the unconditional reinstatement of the Disputant.

The amended terms of reference of the present dispute is "*Unconditional reinstatement as Head of Private Banking Unit with the MauBank Ltd*". The prayers of the Disputant at paragraphs 4 and 104 of his Statement of Case are set in four parts as has been reproduced above. Only the prayer at subparagraph d. concerns the Disputant's unconditional reinstatement.

As has been previously considered, once a matter has been referred to the Tribunal by the Commission for Conciliation and Mediation, the Tribunal has the duty to enquire and make an award thereon. However, the Tribunal cannot enquire into any new matter which is not within the terms of reference of the dispute (*vide Air Mauritius Ltd v Employment Relations Tribunal [supra]*).

It is clear from the Statement of case that the first three prayers prayed for by the Disputant concern his rights to be heard by a Disciplinary Committee in accordance with his contract of employment and the MPCB Code of Conduct and Ethics; his right to a fair hearing; and finding that starting a Disciplinary Committee anew would be in breach of his contract of employment and of the law.

These are matters which relate mostly to the holding of the Disciplinary Committee against the Disputant and which are not related to his unconditional reinstatement. It is clear to see that these specific matters do not fall within the purview of the amended terms of reference referred to the Tribunal. In this vein, it would be useful to note that the unconditional reinstatement of the Disputant has been set out as a separate prayer in paragraphs 4 and 104 of the Disputant's Statement of Case.

The Tribunal cannot therefore find that the prayers set in the Disputant's Statement of Case, save for the prayer of unconditional reinstatement, fall within the scope of the amended terms of the reference of the dispute.

The Tribunal having upheld the preliminary objections raised by the Respondent cannot proceed with the present matter.

The dispute is therefore set aside.

**SD Shameer Janhangeer
(Vice-President)**

**SD Sounarain Ramana
(Member)**

**SD Rabin Gungoo
(Member)**

**SD Renganaden Veeramootoo
(Member)**

Date: 24th April 2017