

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 79/17 to ERT/RN 88/17

Before

Indiren Sivaramen	Vice-President
Vijay Kumar Mohit	Member
Rabin Gungoo	Member
Teenah Jutton-Seeburrin	Member

In the matter of:-

Mr Jean-Didier Fabrice Barbe (Disputant No 1)

And

Air Mauritius Ltd (Respondent)

Mr Mahendranath Bhoyroo (Disputant No 2)

And

Air Mauritius Ltd (Respondent)

Mrs Mary Joyce Glenz (Disputant No 3)

And

Air Mauritius Ltd (Respondent)

Mr Dominic Gouges (Disputant No 4)

And

Air Mauritius Ltd (Respondent)

Mr Jackdeep Jhurry (Disputant No 5)

And

Air Mauritius Ltd (Respondent)

Mr Mohamed Feizal Kheedeer (Disputant No 6)

And

Air Mauritius Ltd (Respondent)

Mr Leelum Kumar Rogbeer (Disputant No 7)

And

Air Mauritius Ltd (Respondent)

Mr Rajendrasingh Seewoonarain (Disputant No 8)

And

Air Mauritius Ltd (Respondent)

Mr Muhammad Beelal Summally (Disputant No 9)

And

Air Mauritius Ltd (Respondent)

Mrs Tiam Mee Michaud (Disputant No 10)

And

Air Mauritius Ltd (Respondent)

The above cases have been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(7) of the Employment Relations Act (hereinafter referred to as “the Act”). All the cases were consolidated following a motion made by Counsel for Disputants and to which there was no objection on the part of Respondent. The Disputants and Respondent were assisted by Counsel. The terms of reference were identical in all the cases and read as follows:

- “1. *Whether Air Mauritius Ltd was entitled unilaterally cancel all offers for the position of Crew Service Leader after having offered employment as Crew Service Leader to the employee; and*
2. *Whether the employee should be compensated with back-pay, including monthly allowances and other benefits as stipulated in Air Mauritius Ltd’s offer of employment for the post of Crew Service Leader.”*

Disputant No 4 deposed before the Tribunal and he stated that he occupies the post of Senior Flight Purser (SFP) at the Respondent since 2007. He referred to the internal vacancy notice for the post of Crew Service Leader (CSL) (copy thereof marked Doc A). Disputant No 4 also referred to a letter from Respondent explaining the implementation of the CSL position and the benefits attached to the position. He also deposed in relation to the salary increase proposed, monthly allowance and fuel allowance proposed when comparing the post of CSL with that of SFP. There were four stages in the selection exercise and after the four exercises, he received a letter from Respondent informing him that Respondent was offering him employment as CSL on probation for a period of six months (copy of letter produced and marked Doc F).

Disputant No 4 stated that this was “une offre définitive” and that he signed the letter to indicate his approval of the said offer and returned the letter personally to the HR department. The letter had to be returned duly signed at latest by 3 April 2015 and he did so. The letter was accepted by the HR Department. In between, there was a mail sent on 26 March 2015 by Mrs Purmessur informing them that the post of CSL had been put on hold (copy marked Doc G). Disputant No 4 averred that Respondent accepted his signed copy of the letter. According to him, there was a valid agreement between Respondent and him. He stated that the mail could not have annulled the offer of Respondent. There were letters of representation sent to the then CEOs and

Chairman of the Board and eventually a meeting was held on 16 September 2016 where they were informed that the post of CSL was still “put on hold”. It was only in July 2017 that a “memo” was issued indicating that the project of CSL was cancelled (copy marked Doc L).

Disputant No 4 stated that there was a “déception totale, dégoût, colère”. For cabin crew, there is no other post beyond that of SFP. He prayed that his rights as CSL be reinstated to him and that he benefits from all his back-pay, rights and other benefits attached to the post of CSL.

In cross-examination, Disputant No 4 stated that he started as Cabin Crew and was promoted to Flight Purser and then Senior Flight Purser which is the top most post in his field as at today. He returned a signed copy of the letter of offer in the office of HR on 2 April 2015. He returned the letter well after having received the mail of 26 March 2015 but he averred that his letter was accepted. He agreed that at a meeting he was informed that the Board of Respondent had commissioned an overall HR audit. Disputant No 4 stated that he was not aware that following the Board’s decision of 20 March 2015 to commission a full HR audit, the Board decided on 25 March 2015 to put on hold all appointment exercises until completion of the HR audit. However, he was informed in July 2017 through a memo that the Respondent would not go ahead with the post of CSL and that management was working on an alternative which would be proposed.

Disputant No 4 stated that for the post of CSL the incumbents would have had to do in addition office work. As at today, he agreed that he was still a SFP. He conceded that he has never worked as CSL because the post has never been implemented. In re-examination, Disputant No 4 stated that when he signed the contract of CSL, the highest post within his work structure became the post of CSL. He was never given the opportunity to work as CSL. Disputant No 4 stated that he was told that those who did not make it to the post of CSL would stay as SFP. He suggested that there would have been two posts namely SFP and CSL. He also averred that he returned his letter after returning to Mauritius on a flight and that he had had no time to read his mails.

Disputant No 3 deponed at another sitting and she agreed with what Disputant No 4 had stated before the Tribunal. She returned her letter through a third party on 2 April 2015. She stated that when she returned her letter on 2 April 2015 this gave rise to an unconditional contract. In cross-examination, Disputant No 3 confirmed that she was aware of the mail sent by Mrs Purmessur on 26 March 2015 well before she returned her letter of acceptance. She agreed that she has continued to perform as SFP even though she added that in between she signed the contract for CSL. She maintained that the post of CSL would not have replaced the post of SFP because some of the

SFPs would not have accepted the post whilst some would not have been qualified for the post.

Disputant No 1 then deponed before the Tribunal and he stated that he agreed with what Disputant No 4 had stated before the Tribunal and with documents the latter had produced. He returned his letter on 26 March 2015 and the letter was accepted. He averred that there was a new contract with new conditions and duties. Disputant No 1 stated that in his case even though he is working as SFP, remunerated as SFP and flying as SFP, he still does not have a formal contract with Respondent as SFP. He only has a mere letter dated 4 May 2011, a copy of which he produced (Doc M). He explained the circumstances leading to Doc M. He suggested that there was an error as to his effective date of entry on the SFP contract sent to him and that as at today he has still not signed his contract.

In cross-examination, Disputant No 1 stated that he did cause a “mise en demeure” to be served on Respondent because of the anomaly which he believes there is in relation to his date of entry. He agreed that he would have signed the contract if there was no such error on the date. He stated that he received Mrs Purmessur’s mail after having already returned his acceptance letter on 26 March 2015. He left the letter at the HR department. In re-examination, Disputant No 1 stated that he receives the salary and conditions of service of SFP as from 1 July 2011 as per Doc M.

Disputant No 8 deponed at yet another sitting of the Tribunal and he agreed with what Disputant No 4 had stated and with the documents the latter had produced before the Tribunal. He stated that he returned his letter of acceptance on or about 25 March 2015. He stated that the letter was signed on 24 March and was returned on or about 25 March. He averred that there was an unconditional offer and that the contract was binding.

In cross-examination, Disputant No 8 agreed that it was possible that the letter of offer was issued to him on 25 March. When questioned as to how he could have accepted the letter on 24 March, Disputant No 8 then stated that it could have been a lapsus and that when he signed the letter he saw the actual date of the letter and inserted that date. When confronted with the dispatch book, Disputant No 8 conceded that he received the letter on 25 March and that the date he has put for accepting the offer was a lapsus.

Mr Keetharuth, a Senior Manager at the Respondent, then deponed before the Tribunal. As Senior Manager in the Cabin Operations, he was responsible to manage the whole cabin crew of Respondent and the SFPs have to report directly to him. He explained the rationale for the post of CSL and stated that the Respondent wanted to replace the position of SFP by that of CSL so that the CSL would do the connection between the inflight environment and the office. He then expatiated that with the project of CSL it

was intended to replace the SFP but Respondent “had also taken care that if ever a minority few could not make it to the level in the selection, we would give them a benefit on personal to bearer basis and that too provided the group size is a reasonable one.” In case some of them did not succeed in the recruitment process, they would be left as SFP but on a personal to bearer basis. For those who were on the borderline, there would have been additional training and an extended probation period just to get the required number of people to take the position of CSL. Sixty-three candidates applied for the post of CSL and fifty-three were successful, five had to go through a longer probation period and five were not successful.

Mr Keetharuth stated that Management started to issue letters to the successful candidates on 25 March 2015 but not all successful candidates had been issued with their letters. He suggested that letters were probably issued in relation to those who were then in the country. Then there was a Board decision which was communicated to them not to go ahead with any promotion or appointment within the organization. There were two board resolutions dated 20 March 2015 and 25 March 2015 whereby management was requested to refrain from any re-structuring exercise and appointments in the company until the completion of the HR audit commissioned by the Board at its meeting of 20 March 2015. A mail was issued to all applicants on 26 March 2015 informing them that the post had been put on hold. Some of them replied to the offer after the mail had been sent to them. Mr Keetharuth stated that following the acceptance of the letter of offer, the successful candidates would, if the post was not put on hold, have had to undergo a training process before taking the post of CSL after the required logistics would have been put in place.

Mr Keetharuth averred that the disputants would have started earning their salary as CSL when they would have been given their contract of CSL. According to him, the contracts would have been given to the disputants when they would start performing as CSL that is performing also office work. Mr Keetharuth stated that it is impossible for the project to go ahead with only twelve CSLs in parallel with SFPs.

In cross-examination, Mr Keetharuth stated that management found that the CSL project was the answer to correct part of the weakness identified by the Skytrax audit. A Malaysian firm was engaged by Respondent for the selection process in the present case. Mr Keetharuth identified nine sets of documents pertaining to copies of letters of offer issued and produced same (Docs N to N8). He agreed that in the letters of offer addressed to the disputants there is no mention that the post may not be filled. He however added that what is not cancelled is maintained. Mr Keetharuth stated that an offer was made because they had decided to fill up the post. He agreed that the Respondent may have created a legitimate expectation but he did not agree that Respondent had offered the disputants a contract. He agreed that Disputant No 1 has

not yet signed a contract as SFP with Respondent but added that the latter has been doing the job.

Mr Keetharuth agreed that it was only in 2017 that the Disputants were informed that the post of CSL was abandoned altogether. He was then referred to alleged appointments made in January and February 2016 at the Respondent which were announced by way of internal memo. Mr Keetharuth stated that since the disputants had not been trained, were not performing the job of CSL and in the absence of any set up for office work to be carried out, the disputants did not have a contract to work as CSL with Respondent. He, however, agreed that all the disputants had accepted the offers made to them within the deadline imparted to them in the said letters. He also produced certified copies of extracts of the relevant Board resolutions of 20 March 2015 and 25 March 2015 (Docs O and P).

The Tribunal has examined all the evidence adduced and the submissions made by Counsel on either side. The crux of the matter is the letter of offer dated 24 March 2015 (in all the cases) from the Respondent and we will reproduce the said letter in its entirety. The letter of offer was identical in all the cases except obviously in relation to the names of the addressees and the salary offered in each particular case. The letter read as follows:

24 March 2015

*Mr. ...
c/o Cabin Operations Department
SSR International Airport*

Sir,

Position of Crew Service Leader – Cabin Operations

Following your application and participation in the selection exercise for the position of Crew Service Leader in the Cabin Operations Department, Management is pleased to inform you that you have been found suitable for the above position.

We are accordingly writing to offer you employment as Crew Service Leader on a probation basis for a period of six months. Confirmation in your new position will be subject to satisfactory conduct and performance during the probation period. In the event of unsatisfactory performance and conduct, your six months' probation period may be extended for a further 3 months period.

Your movement from your current position to the one of Crew Service Leader will be with effect from 01 July 2015.

The conditions applicable to this position are as follows:

- (1) You will be paid a basic salary of Rs on the MCL scale. The salary will be adjusted when computing annual increment effective 01 April 2015, should the annual increment be payable.*
- (2) A Rs5000/- monthly allowance will be payable for office duties.*
- (3) Prorated fuel and maintenance allowances for attending office duties should you commute by your own means of transport.*

While on flying duties, you will be responsible and report to the Captain on board the aircraft.

For all office duties as Crew Service Leader, you will report and be responsible to the Senior Manager – Cabin Operations (presently Mr Vikash Keetharuth) or such other Manager of the Company as may be designated by him/her. The Company reserves the right to change the above reporting relationship.

The main duties this position is set out in the schedule appended to this letter. The list is not exhaustive and can be subject to review. You shall from time to time be required to perform such cognate duties as may be assigned to you by your immediate superior.

The terms of the present agreement will not be applicable and be effective between the Company and yourself until you have signed the acknowledgement of acceptance at the bottom of the agreement.

*You are kindly requested to return one signed copy of this agreement to the **Manager Human Resources** at latest **by Friday 03 April 2015** to indicate that you have accepted the terms of this offer of employment.*

The above agreement will not be valid if received after the abovementioned date, unless you show good cause for the late submission.

Upon your acceptance of the above offer and upon assumption of duty in the position, a formal contract of employment together with a detailed scheme of duties will be issued to you as Crew Service Leader.

Done in good faith and in duplicate.

Yours faithfully,

N K Purmessur (Mrs)
Manager Human Resources

It is appropriate to note that to this letter was appended a list of duties which consisted of no less than twenty (20) “main duties” which the CSL would amongst others be mainly responsible for. Also, specific basic salaries were inserted in the letters of offer (Doc F and Doc N to N8).

A cut-off date, which was Friday 3 April 2015 was expressly provided for in the letter for the addressees to return a signed copy of the “agreement” to indicate that they have accepted the terms of the offer of employment. In this particular case, there is no evidence and it has not been averred that the disputants did not send their acceptance within the delay granted by the Respondent for them to communicate their acceptance to the offer made to each one of them. In fact, it is admitted at paragraph 3 of the Statement of Case of Respondent that the disputants’ acceptance of the conditional offer of employment was before the deadline of 3 April 2015. The real issue is the mail which was issued to all applicants on 26 March 2015 informing them that the post had been put on hold. The mail reads as follows:

“Dear colleagues,

We wish to inform that Management has instructions to keep on hold all recruitment, promotions and transfers across the company. To this effect we are informing you that all offers for the position of Crew Service Leader has been put on hold until further notice.”

Roshni Purmessur

Manager – Human Resource

HR Department

There was no communication yet that the Respondent was no longer going ahead with the post of CSL. Evidence has been adduced as to when some of the disputants have returned copies of the letters of offer signed by them. Disputant No 8 conceded that the date he inserted when signing the letter of offer may be a lapsus. He was quite hesitant and stated that he returned the letter on or about 25 March 2015. There is no conclusive evidence from him as to the exact date he returned his letter. However, there is also no evidence as to when Disputant No 8 actually took cognizance of the mail of 26 March 2015 from Mrs Purmessur. Apart from Disputant No 1 who avers that

he returned his letter in the morning of 26 March 2015 before receiving the mail of 26 March 2015, all disputants must have returned their letters after the mail of 26 March 2015 (for Disputants Nos 7 and 8 the Tribunal has not been provided with sufficient indication on this issue). The Tribunal has not been enlightened further as to whether the disputants (except for Disputants Nos 3 and 4 who clearly took cognizance of the mail from Respondent before sending their letters of acceptance) actually took cognizance of the mail before returning their letters of acceptance of the offer. The Respondent has averred at paragraph 2 of its Statement of Case that the disputants signified their acceptance of the conditional offer after Respondent had officially informed them on 26 March 2015 that the post of CSL had been put on hold. In the light of the evidence on record, we find on a balance of probabilities that, except for Disputant No 1 who may have received the mail from Respondent only after returning his letter of acceptance, the other disputants must have returned their letters of acceptance after the mail of 26 March 2015 (irrespective of whether they actually took cognizance of the mail on the same day).

The Tribunal has examined the relevant case law and doctrine referred to by Counsel. In **Traité de droit du travail, Contrat de Travail par G.H Camerlynck, 1968, p 138**, we can read :

“ 78. Dans la pratique, la conclusion du contrat de travail sera fréquemment précédée d’une offre, qui émane le plus souvent de l’employeur. En l’absence de dispositions particulières du Code du travail le problème de la validité et de la force obligatoire de l’offre doit être résolu par l’application des principes généraux du droit civil.

a) L’offre n’a tout d’abord de valeur qu’à condition d’être complète et précise, concernant notamment la nature de l’emploi proposé et la rémunération correspondante. Il y a sinon simples pourparlers.

b) De plus, étant donné l’intuitus personae qui préside à la conclusion du contrat de travail, et les usages en la matière, l’offre ne peut obliger le sollicitant que lorsqu’elle s’adresse à un bénéficiaire désigné.

...

Par contre, l’offre ferme et précise, adressée à une personne dénommée, engage la responsabilité de son auteur.”

In **Le Contrat de travail : Aspects théoriques et pratiques, par Viviane Vannes, 1996, p 93**, it is provided as follows :

“En revanche, une offre d’emploi devenue définitive, qui contient des conditions d’engagement précises et suffisantes n’exigeant que l’approbation du destinataire

(201), forme le contrat de travail au moment de l'acceptation par le candidat (202). Au moment de l'acceptation de l'offre, la volonté de conclure un contrat de travail est devenue commune aux deux parties. Le contrat de travail existe dès lors à ce moment, et ce même si la prise de cours du contrat peut être différée."

In *Traité de droit du travail, Contrat de Travail* par G.H Camerlynck, 1973, p 39, we have the following :

« 78. A défaut par les parties d'avoir arrêté les termes de leur accord sous forme d'une lettre d'engagement sollicitée par le salarié, le contrat n'est pas définitivement conclu. Dès lors la rupture des pourparlers ne peut donner lieu au paiement du préavis conventionnel (1).

Une entreprise qui, en incitant un salarié à donner sa démission de son précédent emploi et à exposer des frais de voyages, lui a fait à la légère, une offre d'embauchage génératrice d'un préjudice pour l'intéressée ne peut sans faute révoquer son engagement dans un délai de 9 jours n'excédant pas le temps de réflexion et de réponse qu'à défaut de l'avoir préalablement fixé, elle est tenue d'accord au salarié, peu importe qu'une période d'essai ait été prévue.(2) »

Dr. D. Fok Kan in *Introduction au droit du travail mauricien, 1/ Les relations individuelles de travail, 2^{ème} édition, p 79*, states the following:

« Le consentement s'exprime par une offre et une acceptation sur tous les points essentiels du contrat, notamment la rémunération et l'activité. En principe général, avant acceptation, une offre peut être librement révoquée. Dans certaines circonstances toutefois une révocation peut constituer une faute et engage la responsabilité délictuelle de l'employeur. Il en serait ainsi si l'employeur n'accorde pas à l'employé un temps raisonnable pour l'acceptation de l'offre avant de la révoquer. Ainsi dans un arrêt du 22 mars 1972 la cour de cassation a pu décider qu'un délai de neuf jours n'excédait pas le temps de réflexion et de réponse. Il est toutefois à noter que dans l'espèce l'employeur avait incité l'employé à donner sa démission de son précédent emploi. Afin d'éviter de tels problèmes il serait prudent pour l'employeur de fixer le délai de réponse. »

In the present case, it is clear from the letter of offer (see above), that the offer constituted an offer which was *« complète et précise, concernant notamment la nature de l'emploi proposé et la rémunération correspondante. »* Every letter of offer was addressed to each of the disputants individually and was *« ferme et précise, adressée à une personne dénommée »* and would thus constitute *« une obligation pour le sollicitant. »* The last paragraphs in the letter of offer give a clear indication of the willingness of the employer to enter into an agreement with the addressee of the letter. Thus, the letter includes the following :

The terms of the present agreement will not be applicable and be effective between the Company and yourself until you have signed the acknowledgement of acceptance at the bottom of the agreement.

*You are kindly requested to return one signed copy of this agreement to the **Manager Human Resources** at latest **by Friday 03 April 2015** to indicate that you have accepted the terms of this offer of employment.*

The above agreement will not be valid if received after the abovementioned date, unless you show good cause for the late submission.

Upon your acceptance of the above offer and upon assumption of duty in the position, a formal contract of employment together with a detailed scheme of duties will be issued to you as Crew Service Leader.

When we read *a contrario* the first paragraph reproduced above, we find that the terms of the present agreement will be applicable and effective between the company and the worker when the worker has signed the acknowledgement of acceptance. Also, the agreement will be valid if the signed copy of the agreement is received within the cut-off date mentioned. The last paragraph in our mind relates only to the drawing of a “formal contract of employment” which will merely formalize the agreement already entered into between the parties. Even the right which the Respondent had reserved in the internal vacancy notice not to proceed with the filling of the vacancy was not referred to at all in the letter of offer. The intention of the parties was clear and the third paragraph of the letter is in line with same and reads as follows:

“Your movement from your current position to the one of Crew Service Leader will be with effect from 01 July 2015.”

It is only with the memorandum of 6 July 2017 (copy marked Doc L) that “all cabin crew” have been finally informed, among other things, that:

« ... We also wish to inform you that Management has taken a stand not to proceed with the CSL position.

An alternative plan that encompasses all grades will be elaborated and communicated in due course. (...) »

Respondent has adduced evidence to explain why Respondent has initially put on hold the post of CSL. Certified copies of extracts of minutes of the proceedings of the board meetings of 20 March 2015 and 25 March 2015 have been produced (Docs P and O respectively). The communication from the Chairman at the meeting of 20 March 2015 was in relation to the need for a HR audit throughout the organisation. *“The aim would be to assess the efficiency of the Air Mauritius workforce, to understand the effectiveness of its organizational dynamics, to situate responsibilities and to identify*

potential remedial actions, with a view to optimizing the human resources while focusing on productivity and sustainability of the organization.”

It is at the Board meeting of 25 March 2015 that Management was requested to refrain from any restructuring exercise and appointments in the company until completion of the HR audit. This was the Board’s decision and the Tribunal will obviously abstain from enquiring into the Board’s decision in relation to the setting up of the HR audit. The aims of the HR audit were as per Doc P and in any event appear to be quite legitimate and cannot be said to be unreasonable. In the light of the decision of the Board of Directors on 25 March 2015, Management was requested to refrain from any restructuring exercise and appointments in the company until completion of the HR audit and the post of CSL was put on hold. There is no indication that the Board’s decision was geared specifically towards the post of CSL or that there was any “intention de nuire” the disputants. The Disputants have not challenged the evidence that there were other SFPs who were about to be appointed as CSLs. The evidence of Mr Keetharuth as to why, according to him, letters were issued only to the disputants in the first place is on record. The Tribunal needs to consider the legal nature of the letters of offer and their effect when the post of CSL was put on hold and eventually abandoned.

As mere guidance, we may also refer to “*Rencontre des volontés dans un contrat*” from <http://www.cours-de-droit.net/rencontre-des-volontes-dans-un-contrat-a121603164> which reads as follows:

“Valeur juridique de l’offre

La question de la valeur juridique de l’offre a une grande importance pratique. En effet, il s’agit de savoir si l’offre crée un véritable engagement à la charge de l’offrant. Autrement dit, doit-il maintenir son offre pendant un certain temps ? Est-il obligé de conclure le contrat avec celui qui l’accepte ? Ou, au contraire, est-il libre de révoquer son offre quand il le désire ?

La jurisprudence a posé en principe que l’offre peut être retirée tant qu’elle n’a pas été acceptée. Cela se justifie par le fait que l’offre est une simple proposition de contracter; elle ne contient en principe aucun engagement de l’offrant ; puisque cette proposition émane d’une volonté unilatérale, elle ne crée pas de véritable obligation. L’offrant peut donc défaire seul ce qu’il a fait seul. Le principe est donc celui de la libre révocabilité de l’offre tant qu’aucune acceptation n’est intervenue. Mais la jurisprudence a délimité les contours de cette liberté. Elle retient tout d’abord que lorsque l’offre est assortie d’un délai déterminé, l’offrant ne peut pas la rétracter pendant ce délai. Ensuite, même lorsque l’offre ne précise aucun délai, la jurisprudence estime qu’elle doit être maintenue pendant un délai raisonnable, apprécié par le juge selon les usages et les circonstances. Les projets de réforme consacrent cette jurisprudence.

Reste à savoir quelle est la sanction de l'irrespect de ces règles, c'est-à-dire d'une révocation abusive. Il est certain que celui qui révoque son offre pendant le délai déterminé ou raisonnable peut être condamné à verser des dommages et intérêts. Mais peut-on aller plus loin et estimer que la révocation intervenue dans ces circonstances est sans effet et que le contrat s'est donc formé au moment de l'acceptation ? La jurisprudence y est hostile. »

In this particular case, all the disputants had agreed to the terms of the letters of offer addressed to them and had returned signed copies before the deadline imparted to them. By unilaterally putting on hold all offers for the post of CSL and eventually not proceeding with the post of CSL, the Respondent no doubt altered and revoked the offers made to the disputants. The putting on hold of the offers was done when the disputants were still within the delay imparted to them to accept the offer. The Tribunal holds that in the absence of any "force majeure", the Respondent was not in the present matter entitled to unilaterally put on hold and eventually cancel the offers for the position of CSL.

However, the issue is what remedy, if any, is available to the disputants following the putting on hold and eventually the decision of Respondent not to proceed with the position of CSL after firm offers had already been made to the disputants. **Dr Fok Kan** in his book **Introduction to Mauritian Labour Law, 2/ The Law of Industrial Relations** at page 67 refers to the cases of **Mrs D.C.Y.P and The Sun Casino Ltd, RN 202/1988** and **Mr Mootoosamy and The Bank of Baroda, RN 155/1984**. He states the following:

It is submitted that such an approach could also be adopted in Mauritian law as the line of reasoning adopted in the two cases of In Re : Mrs D.C.Y.P. and The Sun Casino Ltd²⁰⁷ and In Re: Mootoosamy and The Bank of Baroda²⁰⁸ shows. The PAT was prepared to compensate the employee on the basis of the bad faith of the employer. Admittedly the PAT considered these two cases to be exceptional. Both cases concerned claims by individual employees who felt that they had been victimised when they were not promoted to a higher post. The PAT referred to "fundamental principles of fair employment" and condemned the employer to pay a certain sum of money to the employees. But the Tribunal took care to state that

"Such an assessment is not to be regarded in any way as a punitive measure for any past fault or omission. This Tribunal is not here to award damages, it must only see how, by using whatever wisdom and experience it may have, an employee who has had every reason of feeling frustrated, who, in this case, even had to put up a very courageous but trying and tiring battle, and relinquish his frustration, feel safe and relaxed in his employment, recover his dignity and at the same time recover also even if it is only part of what could have been payable to him over a certain period, had his case been given a consideration similar to that given to others".

If we refer again to «*Rencontre des volontés dans un contrat*» (see above), we have the following footnote (3) when referring to the «solution traditionnelle» in relation to «la sanction» in relation to «une révocation abusive» of an offer. The footnote reads as follows: «... prévoit que la rétractation abusive de l'offre «n'engage que la responsabilité délictuelle de son auteur sans l'obliger à compenser la perte des bénéfices attendus du contrat». La solution est identique à celle posée au sujet de la rupture abusive des pourparlers.»

In the present case, given the unchallenged evidence on record in relation to the timing of the relevant board decisions, that it was impossible to proceed with the project of CSL with some ten CSLs, the alternative plan allegedly being contemplated as per the memorandum of 6 July 2017 (Doc L), the letters which were not yet sent to other allegedly successful SFPs because they were then not in the country according to Mr Keetharuth and the post of SFP which the disputants have always been occupying despite the letters of offer, the Tribunal finds that it cannot hold that the decision of Respondent not to proceed with the position of CSL is null and void. The Tribunal is also not satisfied that Respondent acted mala fides even though Respondent certainly committed a “faute” towards the Disputants by making “une révocation abusive” of the offers made to them. Even if we were to assume that in the case of at least one disputant, the parties had already entered into an agreement (whether under the “théorie de l’émission” or “la théorie de la réception” of the “acceptation”) before the agreement was terminated by Respondent, there is nothing on record which would suggest that it was the intention of Respondent to do otherwise than to terminate the said agreement/s. Also, there has been no “novation” since the contracts of employment of the disputants as SFPs were not replaced and the disputants are still operating as SFPs. Even if one was to argue that the disputants had been appointed as CSLs, there would have been no “extinction” of the obligations under their ‘former’ contracts of employment as SFPs. As employees, disputants would certainly wish to be able to claim benefits accrued following their employment as SFPs.

Be it in the case of “une révocation abusive” by the Respondent of the offers made to the disputants or of a termination of any agreement by the Respondent, the Tribunal finds that the Respondent may only be liable to damages. The disputants, in the light of the reasons given above and all the evidence on record cannot claim that they have been appointed as CSLs or that the revocation of the offers was null and void. Thus, as regards the dispute under limb 1, the Tribunal finds that an offeror who makes an offer unilaterally must be able to unilaterally cancel the said offer. However, in the present matter and bearing in mind all the evidence including the delay imparted to the disputants to accept the offers, the Respondent was not entitled to unilaterally put on hold and eventually ‘cancel’ the offers for the position of CSL as they did after having

made firm offers of employment as CSL to the disputants without incurring liability. It is apposite to note that the fact that the offers were put on hold in the first place before Respondent decided eventually not to proceed with the position of CSL does not affect our reasoning except that the uncertainty for the disputants was thereby prolonged. However, after analysing carefully the manner in which the terms of reference have been drafted under limb 1, the Tribunal finds that several essential elements are missing including the timing of the cancellation or putting on hold and cancellation of the offers; and any acceptance of the said offers. In the absence of such elements the dispute is merely to the effect whether the Respondent as offeror (making unilaterally offers for the position of CSL) was entitled to eventually cancel the offers made. As stated above, generally an offeror may cancel the offer he made unilaterally. Thus, on this basis alone the Tribunal will award that the Respondent was entitled to unilaterally cancel all offers for the position of CSL after having offered employment as CSL to the employees, and the dispute is set aside.

However, in the light of all the evidence adduced by the parties and for the reasons given above, the Tribunal trusts that the parties will take due consideration of the award of the Tribunal in its entirety.

As regards the second limb of the dispute, though the Tribunal is satisfied that the Respondent has committed a “faute” by making “une révocation abusive” of the offers/ termination of any agreement reached, the Tribunal finds that the matter relates more to a claim for damages than anything else. Bearing in mind the evidence on record, the Tribunal is not satisfied that the present matter, which could have applied to many other SFPs who, however, were not issued with their respective letters, is similar to the exceptional (underlining is ours) cases of **Mrs D.C.Y.P** and **Mr S.P Mootoosamy (see above)** where the then Permanent Arbitration Tribunal was prepared to compensate the employee on the basis of the deliberate wrong act of the employer in the first case and in the second one where “greater prejudice” had been caused to the disputant whose case had not been given similar consideration to that given to others. The Permanent Arbitration Tribunal took much care in providing specifically that the assessment of the sum of money ordered by the Tribunal to be paid by the employer “is not to be regarded in any way as a punitive measure for any past fault or omission.” In an interpretation award (**RN 155A**) of the same case of **Mr S.P Mootoosamy (above)**, the Tribunal stated that the compensation was not meant to cover any damages incurred, but would serve as a moral boost up. In our opinion, the Tribunal is not here to award damages.

However, in the light of the observations made by the Tribunal in the present matter, the Tribunal will urge all parties to put their heads together to find a solution which will be acceptable to one and all. All avenues are to be explored including any form of correction “*so that future relations between all concerned be as smooth as possible.*” (case of **Mrs D.C.Y.P (above)**). The above situation has no doubt caused unnecessary

tension, loss of energy, resources and trust and the sooner an effective and acceptable solution is worked out, the better it will be, not only for the disputants but also for the Respondent. The Tribunal also bears in mind the own submission of Counsel for Respondent that *“it may well be that damages might be an adequate remedy for the Disputant but that is not the forum for that kind of claims here ... That claim should be made somewhere else.”*

For all the reasons given above and bearing in mind the manner in which the terms of reference have been drafted where compensation in the form of back-pay including monthly allowances and other benefits is being sought, the dispute under limb 2 is set aside.

SD Indiren Sivaramen
Vice-President

SD Vijay Kumar Mohit
Member

SD Rabin Gungoo
Member

SD Teenah Jutton-Seeburrin
Member

22 May 2018