

EMPLOYMENT RELATIONS TRIBUNAL

ORDER

ERT/RN 114/2019

Before:

Shameer Janhangeer	-	Vice-President
Raffick Hossenbaccus	-	Member
Bharuth Kumar Ramdany	-	Member
Parmeshwar Burosee	-	Member

In the matter of:

Airports of Mauritius Limited Employees Union

Applicant

and

Airports of Mauritius Co Ltd

Respondent

The present matter is an application for an order under *section 51 (8)* of the *Employment Relations Act ('Act')* requiring the Respondent to comply with the Procedure Agreement. The Airports of Mauritius Limited Employees Union ('AMLEU') has notably averred, in its application dated 24 May 2019, that Airports of Mauritius Co. Ltd ('AML') has breached Article 5.1 of the Procedure Agreement in as much as the President of the Applicant Union has been suspended following a free expression of views on social media. AML is resisting the present application.

Both parties have submitted their respective Statement of Case in the present matter. The Applicant was assisted by its Trade Union representative, Mr N. Gopee. Whereas the Respondent was assisted by Mr M. Sauzier SC appearing together with Miss N. Behary Paray, Counsel, instructed by Mr S. Mardemootoo, Attorney-at-Law.

Mr Shavindra Dinoo Sunassee, Airport Operations Control Centre Operator at AML, deposed on behalf of the Applicant Union. He stated that he is also the President of the AMLEU and communicates by mail, newsletters, Facebook, WhatsApp and Viber to his 634 members. The Facebook page was created at the request of the Union so as to be able to communicate with more staff. The Union decided, through Mr Purmessur, to create the Facebook page and as the latter is not an executive, he can moderate any post. Mr Purmessur is the administrator of the Facebook page and a simple member of the Union. Mr Sunassee has been posting on the Facebook page for about four years as President of the Union. He does not recall the exact words of the post the AML is contesting. He identified the posts at Annex R6 of the Respondent's Statement of Case as those that management are claiming to be libellous. He identified a post of his in the annex, which he does not find to be libellous. He has been informed by management of disciplinary actions being taken against him although the exact post is not mentioned. He has not obtained certified copies of the posts.

Upon questions from Counsel for the Respondent, Mr Sunassee notably stated that the present action was entered upon his instructions. He agreed that in his application before the Judge-in-Chambers, he did not mention that the disciplinary proceedings against him were in breach of Article 5.1 of the Procedure Agreement. He produced a copy of the *Proecipe* together with an affidavit sworn by him (Document A). He did not mention any issues in relation to Article 5.1 of the Procedure Agreement in his second affidavit dated 2 May 2019 (produced as Document B). He also produced a copy of an Order dated 10 May 2019 made before the Honourable Judge-in-Chambers (Document C). Before the Judge-in-Chambers, it was not discussed if the posts were in his personal name or in that of the Union. In his explanation given to the employer, he agreed that he did not state that he was acting on behalf of the Union.

Mr Sunassee also stated that he was suspended and on appealing against the suspension, he wrote a letter dated 21 May 2019 (produced as Document D). He agreed that he did not state that he was acting as President of the Union and not in his own name therein. In his Statement of Case before the Tribunal, it is the first time that he stated that he was not acting in his own name but in the name of the Union. He is aware that the General Workers Federation has informed the AML that a statement was given to the CCID bearing OB 690/19. He does not agree that he tried to invoke *section 38 (2)(b)* of the *Employment Rights Act* to avoid disciplinary proceedings by going to the Police as AML had already complained to the Police on 4 April. He agreed that he has done several things to stop the disciplinary proceedings from progressing.

Mr Sunassee also responded that the AML Staff Corner Facebook page was made at the request of the Union and that it does not belong to the Union. Mr Purmessur controls the Facebook page and can refuse membership of the page to a member of the Union and allow membership to a non-member of the Union. He is no longer a member of the Facebook page having he has left same as information was being leaked to management. He did not agree that what he posted on the page was in his own name and not as President of the Union.

Mr Poorun Sharma Dabedeen, Secretary of the AMLEU, was also called to depose. He posts messages on the AML Staff Corner Facebook page to communicate what is going on in the management and executive meetings. Mr Purmessur is the administrator of the page and they have been given the right to post and communicate anything with regard to the Union. He produced a post dated 29 June 2017 on using the platform to communicate with other members (Document E) from Mr Sunassee with a comment from Mr Purmessur.

Following questions from Counsel for the Respondent, Mr Dabedeen notably stated that as per the document produced, permission to use the Facebook page existed since 2017. Although the document does not show it, he maintained that they had permission to post on the Facebook page since 2015. He agreed that posting on the Facebook page can be done as Secretary of the Union or in his own name. He posts as an Executive member of the Union.

Mr Prashant Purmessur, Administrator at AML, was called to depose on behalf of the Respondent. He created the AML Staff Corner Facebook page some 4 to 5 years back on behalf of the AML staff. It is not correct to say that the Facebook page was created on behalf of the Union. It was created as a medium to share information among staff as most of the staff do not have access to emails and to inform them of ongoing projects or things happening at AML. He is the administrator of the page. It is a closed group page for AML staff only. He has exclusive control over who becomes a member of the page. Membership of the AMLEU is not a precondition to become a member. Managers and Heads of Departments are also in the group and they are not members of the Union. He has a disclaimer on what is being posted and if something is wrong, he will ask the person to delete the post. On being shown Document E, the witness stated that the Union has posted messages before. On the page, he does not differentiate between Directors or Managers or the AML group, it is only staff.

Upon questions from Mr Gopee, the witness notably stated that Mr Sunassee made a request a long time back to join the page and he would need to check if it was as President of the Union. He is aware of disciplinary proceedings against the President of the Union based on certain messages posted on the AML Staff Corner page. He does not know if it is the Officer-in-Charge who has instituted the disciplinary proceedings. He does not know how the Officer-in-Charge came to be in presence of the posts. Mr Purmessur also confirmed that Mr Sunassee posted on the page as a member of the group and that he is no longer a member today.

Mr N. Gopee chose to make a statement at the close of the case for the Respondent. He notably stated that the posts of Mr Sunassee on the AML Staff Corner were made at around 2300 hrs and 0100 hrs as per the letter dated 31 May 2019 at Annex 5 of the Disputant's Statement of Case. Mr Sunassee could not have been an employee at this time according to the terms and conditions of service, a copy of which he submitted. According to this, the full time of employees during hours of work is deemed to be at the disposal of the company. Therefore, Mr Sunassee is an employee during his working time and not at work. The disciplinary proceedings instituted against Mr Sunassee are not being disputed and the Tribunal has no jurisdiction to hear any case on disciplinary proceedings. The Applicant is seeking an interpretation of Article 5.1 of the Procedure Agreement and whether this article has been breached by allegedly posting messages on the AML Staff Corner Facebook page.

Counsel for the Respondent notably submitted that there has been no admission by Mr Sunassee as being the one who made the Facebook posts except for one post. Although Mr Sunassee is claiming the benefit of Article 5.1 of the Procedure Agreement, he has not been able to prove that he was posting as a member of the Union and it is only before the Tribunal that he is contending that he was acting as President of the Union. His acts reveal that he is deliberately and desperately trying to avoid the disciplinary proceedings instituted against him.

In the present matter, the AMLEU have applied to the Tribunal under *section 51 (8)* of the *Act* requiring AML to comply with a provision of the Procedure Agreement. In its application, the Applicant contends that the Respondent is in breach of Article 5.1 of the Procedure Agreement in as much as its President has been suspended following a free expression of views on social media.

It is therefore incumbent on the Tribunal to consider Article 5.1 of the Procedure Agreement and whether the Respondent has effected a breach thereof. It should be noted that the Procedure Agreement was made between the AML and the AMLEU on 14 March 2011. The impugned article reads as follows:

Article 5 – Union security and functions

- 1. The Company shall not discriminate against an employee because of membership in or activity on behalf of the Union. When acting as such, representatives of the Union shall be free to express their views in good faith without fear that the individual relations between employer and employee will be affected in any way thereby.*

The aforesaid article of the Procedure Agreement falls under the heading of ‘*Union security and functions*’. It notably forbids AML from discriminating against any employee due to membership or activity on behalf of the Union. It further stipulates that employees acting as representatives of the Union shall be free to express their views in good faith with the proviso that individual relations between the employer and employee will not be affected in any way thereby. This article thus confers a protection to an employee acting as a Union representative to allow him or her to express his or her views in good faith.

The Applicant Union is contending, in its application, that the Respondent is in breach of Article 5.1 of the Procedure Agreement in as much as its President has been suspended following a free expression of views on social media.

It must, at this stage, be noted that in adducing evidence to satisfy the application, the AMLEU called two witnesses, namely its President and Secretary. However, having noted the evidence of these two witnesses, the Tribunal has not found where either have stated that the Respondent is acting in breach of Article 5.1 of the Procedure Agreement nor has any reference been made to the aforesaid article in the evidence-in-chief of the two witnesses. It is trite law that the burden is on the Applicant to prove its case.

What has been very much in issue is whether Mr Sunassee made the posts to the AML Staff Corner Facebook page in his capacity as President of the Union or as an employee of AML. It must, in this context, be noted that Mr Sunassee did not admit to making all of the posts referred to and only recognised one post made on 30/31 March 2019.

In this regard, Mr Sunassee acknowledged that it is before the Tribunal that he has evoked for the first time that he made the post as President of the Union despite not having raised same in his application before the Judge-in-Chambers nor in his written statement dated 22 May 2019 in reply to the Letter of Charges dated 11 May 2019 from the AML. From the ALM Staff Corner Facebook post acknowledged by Mr Sunassee, the Tribunal has however noted that the post is headed '*Sharvin Sunassee, Visual storyteller*' and at no point does it refer to Mr Sunassee as being President of the AMLEU.

The AML Staff Corner Facebook page, according to the evidence of its administrator Mr Purmessur, is not exclusive to the AMLEU and its Union members as it is accessible to all AML staff. It is open for any employee, whether a member of the Union or not, to post on the Facebook page provided that he or she is a member of the AML Staff Corner Facebook group. It cannot therefore be said with any degree of certainty that Mr Sunassee made the Facebook post on the AML Staff Corner page as President of the Union.

The Tribunal has also noted that the question of whether Mr Sunassee was posting on the AML Staff Corner Facebook page in his own name or as President of the AMLEU is a matter which could also be raised before the Disciplinary Committee itself and left to the auspices of the members of the Committee to decide upon. The Tribunal however is only concerned with this particular issue in the context of any actual breach to Article 5.1 of the Procedure Agreement as per the application before it.

Mr Gopee, who appeared assisting the Applicant Union, sought aid from the Term and Conditions of Employment at AML to assert that Mr Sunassee could not have been acting as an employee when the AML Staff Corner Facebook post was allegedly made between 23 00 hrs and 01 00 hrs. Reference has notably been made to paragraph 10.1.1 of an extract of the Terms and Conditions of Employment he submitted. This paragraph provides as follows:

10.1.1 The full time of employees during hours of work is deemed to be at the disposal of the Company and they are required to give their best at all times in the service of the Company.

In relation to this issue, it would be apposite to note that Mr Sunassee did not raise this matter in his evidence and it is only at the stage of submissions that Mr Gopee evoked same. The Tribunal however notes that paragraph 10.1.1 merely makes reference to the time of the employees during hours of work to be at the disposal of AML and does at no

point state or imply that an employee ceases to be an employee of AML outside his hours of work. Whether an employee ceases to be an employee outside his hours of work is a contractual matter between the employee and the employer.

Although it is common ground that the Tribunal is not concerned with the disciplinary proceedings instituted against Mr Sunassee, it should be noted that the suspension of Mr Sunassee by AML was effected pursuant to procedures to be found in the Procedure Agreement as was convened in the Order agreed before the Honourable Judge-in-Chambers. However unfair it may feel to Mr Sunassee, it is not an arbitrary act by the employer to have suspended him nor has this been contended by the Applicant Union in the present matter.

The Tribunal, having notably found that the Applicant Union has failed to evoke a breach of the impugned article of the Procedure Agreement when making its case and having noted that it is not a foregone conclusion that Mr Sunassee was making the Facebook post as President of the AMLEU, cannot find that there has been a breach of Article 5.1 of the Procedure Agreement by AML in the present matter and therefore cannot order that AML should comply with the impugned provision of the Procedure Agreement.

The Tribunal would however wish to remind the parties that it should not be overlooked, in a spirit of harmonious employment relations, that both the employer and the worker have joint responsibility for good employment relations and that good human relations between the two are essential. The Tribunal would therefore strongly urge the parties to find room for mutual respect and understanding towards each other and to abide to the existing agreements, in particular the Procedure Agreement, binding the parties to the present application.

The application is otherwise set aside.

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

**SD Raffick Hossenbaccus
(Member)**

**SD Bharuth Kumar Ramdany
(Member)**

**SD Parmeshwar Burosee
(Member)**

Date: 1st July 2019