

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 12/2024

DETERMINATION

Before: -

Shameer Janhangeer	-	Vice-President
Parsooram A. Ramasawmy	-	Member
Chetanand K. Bundhoo	-	Member
Muhammad Nayid Simrick	-	Member

In the matter of: -

Mr Suraj AUCKLE

Disputant/Complainant

and

PRINCES TUNA (MAURITIUS) LTD

Respondent

The present matter has been referred to the Tribunal for determination by the Supervising Officer of the Ministry of Labour, Human Resource Development and Training pursuant to *section 69A (2) of the Workers' Rights Act 2019* (the "WRA"). The Terms of Reference of the dispute read as follows:

Whether the termination of employment of Disputant is justified or not in the circumstances and whether Disputant should be reinstated or not.

Both parties were assisted by Counsel. Mr G. Glover, SC appeared together with Mr N. Moolna for the Disputant. Mr N. Boolell appeared for the Respondent together with Mrs U. Boolell SC, Mr F. Soreefan and Mr Z. Seekdaur. Each party has submitted its respective Statement of Case in the present matter.

THE DISPUTANT'S STATEMENT OF CASE

The Disputant was employed at the Respondent since 11 January 1995 and his last position was Welfare Manager. He has an unblemished record throughout his 29 years of service. He related an incident between one Mrs Cavalot and himself in the mess room on 16 August 2023. On 31 August 2023, he received a suspension letter in application of *section 66* of the *WRA* under the hand of Mrs P. Chingen, the Respondent's Head of Human Resources, whereby he was being suspended pending the determination of an enquiry following a complaint made by an employee for an alleged act of violence at work. He was never asked for his version of events of 16 August and there cannot have been any fair and unbiased enquiry.

On 26 September 2023, i.e. 15 days after the letter of suspension, he received a letter of charges from Mrs Chingen stating that the internal investigation was completed, that the Respondent had grounds to believe that he may have committed an act of violence at work and was convened to a disciplinary committee on 4 October 2023. Two charges were laid against him in the letter. On 3 October 2023, he filed a complaint at the Labour Office regarding the manner in which Mrs Cavalot had addressed him in the mess room on 16 August 2023 and in relation to his suspension at work. However, he was not involved in the discussions between the Labour Office and the Respondent regarding his complaint. At the disciplinary committee on 4 October 2023, in an attempt to have meaningful discussions for a settlement, the matter was put in abeyance. His salaries for September and October 2023 were paid by bank transfer, but that for November 2023 was paid by cheque and was not accompanied by a payslip. On a phone call with Mrs Chingen on 21 December 2023, he was *inter alia* assured that the Respondent did not intend to terminate his employment.

On 29 December 2023, he received another letter from Mrs Chingen whereby the disciplinary committee was rescheduled to 8 January 2024. He wishes to highlight the lack of response or effort from the Respondent or their legal representative regarding the possibility of settlement. He firmly believes that the Respondent reconsidered their stance following his complaint to the Labour Office and he was thus victimised for making a complaint. Before the disciplinary committee meeting on 8 January 2024, he was informed by a senior officer of the Respondent, Mr Joe Park that, in an informal conversation with Mrs Chingen, the Respondent

did not intend to terminate his employment but the disciplinary committee was deemed necessary.

The Disputant attended the disciplinary committee on 8 January 2024 at 1400 hrs at Temple Court whereby he was assisted by Counsel but choose not to call any witnesses. Mrs Cavalot and two witnesses for the Respondent deposed and he gave his version. In submissions, his Counsel stated that the incident was unfortunate and that the Disputant tendered his apologies to Mrs Cavalot for any discomfort she may have experienced during the interaction on 16 August 2023. In the parking of Temple Court, he was reassured by Mr Nalletamby of the Respondent that the latter did not intend to terminate his employment as his services were still required. However, on 12 January 2024, he received a letter of termination. He is still on good terms with his colleagues at the Respondent Company and although he disagrees with their course of conduct in the matter, they still share mutual respect and he verily believes that his reinstatement would be beneficial to both parties.

The Disputant avers that his termination of employment was unlawful and unjustified inasmuch as the Respondent acted in breach of *section 64 (2)(a)(i)* of the *WRA* by failing to notify him of the charges within the required time frame and not carrying out a proper and timely inquiry as the complaint was made on 17 August 2023 and the letter of suspension is dated 31 August 2023; there was no fair and objective inquiry as he was not even asked to give his version of events before being charged; the Respondent changed tack and decided to proceed with the hearing because of his complaint at the Labour Office; the Respondent did not comply with the *WRA* in terminating his employment as they did not act in good faith and decide that they could not take any other action but to terminate his employment especially after 29 years of unblemished service; and the Respondent failed to make a proper assessment of whether it could not, in good faith, take any other course of action other than terminate his employment.

THE RESPONDENT'S STATEMENT OF CASE

The Respondent has raised a plea *in limine* as per its Statement of Case as follows:

The Respondent moves that the present matter which has been referred to the Employment Relations Tribunal (the 'Tribunal') pursuant to section 69A of the Workers' Rights Act 2019 (the 'WRA') be set aside inasmuch as:

- A. *The Tribunal holds no power to examine the process of dismissal and make any findings on termination in the same manner as the Industrial Court is mandated to do so.*
- B. *The Respondent is unfairly and unjustly prejudiced by being denied its ordinary right to appeal as governed by the WRA; this in favour of a judicial review which carries a higher threshold of receivability and would not be the appropriate remedy to the Respondent in the present case.*

On the merits, the Respondent has notably averred that the Disputant's unblemished record does not serve as *carte blanche* rendering him immune from any form of disciplinary action for his behaviour at the workplace. As per the issue before the Tribunal, it has to be satisfied that the relationship between the employer and the worker has irretrievably broken down. The Respondent cannot entertain such a possibility in view of the seriousness of the act of misconduct committed by the Disputant in front of other staff. The Respondent has given due consideration to the request for reinstatement and its stand is that the relationship has irretrievably broken down with the worker considering the gravity of the effect the incident has had on the workforce. Such a misconduct cannot be condoned for an employee holding a senior managerial position and would set a dangerous precedent with respect to the employer's duty to ensure orderly and good behaviour. The Respondent has in no way acted contrary to the provisions of the *WRA* in terminating the Disputant's employment and his version of facts is denied.

It has been averred that further to a complaint made by a receptionist, Mrs Sandrine Cavalot on 17 August 2023, the Respondent was made aware of an incident of violence at work. The Respondent, acting in accordance with *section 114* of the *WRA*, opened an internal investigation to shed light on the matter. The Disputant was subsequently suspended on full pay pursuant to *section 66 (1)(a)* of the *WRA* as per letter dated 31 August 2023. The gist of the complaint of Mrs Cavalot was that she was subject to a humiliating and degrading treatment by the Disputant in an open mess in front of other colleagues. An aggravating incidence of the act arises for the fact that the Disputant is employed in a managerial position and is to set an example; being employed as Welfare Manager, he is meant to adhere to behaviour that inspires a sense of trust from his colleagues.

The Respondent avers that it acted according to the law by taking appropriate action by suspending the Disputant to protect the rights of Mrs Cavalot pursuant to *section 114 (4)* of the

WRA. The charges levelled against the complainant were notified on 26 September 2023 within 10 days of the internal investigation on 23 September 2023. At the disciplinary committee hearing of 4 October 2023, the Disputant's legal representative made a request to be granted time in an attempt to promote a settlement in accordance with *section 64 (8)* of the *WRA*. By letter dated 29 December 2023, the Disputant was convened anew before the disciplinary committee now scheduled for 8 January 2024 to afford him the opportunity to answer the charges against him. By letter dated 5 January 2024, it was imparted to the Disputant's legal representative that a settlement had failed to materialise and that without prejudice negotiations remain open between the parties.

The Respondent was apprised of the Chairperson's report dated 11 January 2024 regarding the disciplinary committee wherein the Disputant was found guilty on all charges proffered against him. It was imparted to the Disputant that he was entitled to have any of the Respondent's employees depone as his witness in the hearing and his failure to do so cannot be laid at the door of the Respondent. It is only on being made aware of the seriousness and gravity of his acts that the Disputant tendered a disconcertingly late apology to Mrs Cavalot during the hearing. It is therefore denied that his termination of employment was unjust. In assessing whether it could not in good faith take any other course of action than termination, the Respondent considered that such acts committed by the Disputant could not be tolerated at the workplace, the more so a Welfare Manager's duty would be to prevent such acts from occurring. The Disputant's acts and doings constitute a breach of trust and the Respondent cannot continue to employ a manager which can react unpredictably in a fit of rage and anger.

The Respondent avers that the Disputant's termination of employment was lawful inasmuch as it has complied with the requisite statutory delays in accordance with the *WRA*; the Disputant was afforded the opportunity to answer the charges levelled against him during the disciplinary committee; it is the Respondent's prerogative to proceed with the committee and hear the Disputant and his complaint at the Labour Office had no bearing whatsoever on the decision of the Respondent; the Respondent duly considered the finding of the committee and assessed the circumstances thereby deciding that it could not in good faith take any other course of action than to terminate the Disputant's employment. The Disputant cannot be reinstated in his former employment as the relationship between the parties has irretrievably broken down.

THE EVIDENCE OF WITNESSES

The Disputant, Mr Suraj Auckle deposed and affirmed as to the truth of his Statement of Case. He produced the letter of suspension he received on 31 August 2023 (Document A). No explanations were ever asked of him. As per letter dated 26 September 2023 (produced as Document B), he came to know that he was suspended because of a complaint made by Mrs Cavalot since 16 August 2023 and that he was invited to a disciplinary committee on 4 October 2023. On 3 October, he complained to the Labour Office against Mrs Cavalot regarding the incident. The disciplinary committee was postponed following talks between his Counsel and Mr Nalletamby, the Respondent's HR Operations Manager, to find a settlement. He produced a photocopy of two cheques (Documents C & D) representing his salary for November 2023 and his thirteenth month payment. On 21 December, he received a phone call from the Head of HR, Mrs Priya Chingen telling him that he must go through a disciplinary committee and that he will regain his job. He was surprised to receive a letter dated 29 December 2023 (produced as Document E) whereby he was being called before the disciplinary committee on 8 January 2024 as he had made a complaint to the Labour Office. He also produced a statement made by Mr Joseph Edward Parke, Technical Services Manager at the Respondent (Document F).

The Disputant further stated that at the disciplinary committee on 8 January 2024, he took cognisance of the witness statement of Mrs Cavalot dated 17 August 2023 (produced as Document G) and she and two other witnesses deposed. He did not bring any witnesses, the statement from Mr Parke having come afterwards. He received the letter of termination on 12 January 2024 (produced as Document H) and proceeded to lodge a complaint with the Ministry of Labour. The decision to terminate his employment is unjustified as he was not informed of the charges against him within the delay prescribed by law in being served with the charges on 29 September 2023 about five weeks after the incident; there was no proper enquiry as his version as the principal protagonist was never sought; the complaint he made to the Labour Office was used against him as per the letter dated 29 December 2023; and the employer did not decide in good faith as per the law. He has never had any disciplinary problems before and had 29 years of service. The decision to terminate his employment is disproportionate to what he did, which he has always denied. He is asking the Tribunal for his reinstatement or, if it is not possible, for payment of severance allowance.

The Disputant was questioned by Counsel for the Respondent. He notably answered that as Welfare Manager, he was responsible for welfare. He presented excuses to Mrs Cavalot for

any discomfort at the disciplinary committee. He did not have the opportunity to present his excuses earlier and could only do so before the disciplinary committee. He complained to the Labour Office after having received the letter of charges making him aware of the issue. It was a normal day for him after the incident on 16 August 2023. He was paid during his suspension. It is the employer's right to take disciplinary action and call him before a disciplinary committee. Regarding his averment that he is still on good terms with his colleagues, he has been told that everybody wants to see him back as he was handling projects at canteen level.

Mrs Priya Chingen, Head of Human Resources at Princes Tuna (Mauritius) Ltd, was called on behalf of the Respondent. She notably stated that Mrs Cavalot made a complaint that Mr Auckle acted violently in the mess room while they were having a conversation, felt very bad about it and her self-esteem was affected. They had to investigate and as the allegation was against an employee of her department, it had to be referred to a Senior Manager of the company. The Managing Director of the company decides on termination. The incident created a bad image for the company and for the individual himself; it was important to take action. The relationship has irretrievably broken down between Mr Auckle and the company as they have an employee, at this level, not respecting another employee; as Welfare Manager, the person has a responsibility to look after the welfare of employees; and if the Welfare Manager has acted this way, this has broken the trust. She was not present before the disciplinary committee and although she had spoken to Mr Parke, she knew she was not going to form part of the disciplinary committee.

When questioned by Counsel for the Disputant, Mrs Chingen notably stated that she could not recall if the Disputant had applied to a vacancy notice in October 2016 (produced as Document J) for the post of Welfare Manager. She agreed that Mrs Cavalot reported and management was made aware of an alleged misconduct of Mr Auckle on 17 August 2023. Mr Auckle is then made aware on 31 August 2023 only being told he is being suspended for violence at work without naming the complainant nor the date of the alleged incident. Prior to 26 September 2023, Mr Auckle was not asked for his version of events. The case was referred to the Managing Director, Mr Domun and Mr Nalletamby was partly involved in the investigation.

Mrs Chingen also answered that she interviewed the concerned person and agreed that she was involved in the enquiry. She considered people who were present at the time and could have heard the conversation based on the names provided by Mrs Cavalot. Without Mrs Cavalot there was no case and she decided to believe her version. The Health and Safety Officer as well

as the HR Manager are responsible for the welfare of employees. She placed the reason for the convocation of the Disputant to the disciplinary committee in the letter dated 29 December 2023. She also agreed, referring to the letter dated 12 January 2024, that before termination of employment there is a duty on the employer to ask itself whether it can or should terminate the employment in good faith. In re-examination, she stated that management has explored all avenues before taking the decision.

Mrs Sandrine Cavalot was also called on behalf of the Respondent. She notably related in detail the incident between herself and the Disputant on 16 August 2023 in the company mess room. Ten minutes after the incident, she spoke to Mr Nalletamby, the HR Manager and he advised her to make an official complaint. She did so the next day and identified Document G as her official complaint. She has never received excuses from Mr Auckle. When questioned by Counsel for the Respondent, the witness notably stated that there might have been ten persons in the mess room. She agreed that she was not threatened. There was a conversation in which Mr Auckle raised his voice. She was not present at the disciplinary committee when Mr Auckle deposed. Mr Avanish Narisumulu, Human Resource Clerk was also called on behalf of the Respondent to depone regarding the incident in the mess room on 16 August 2023. Finally, Mrs Sultana Sayed Hossen, Hostel Coordinator, was called to produce the report of the disciplinary committee dated 11 January 2024 (Document K) which refers to the disciplinary committee hearing of 8 January 2023.

THE SUBMISSIONS OF COUNSEL

Learned Senior Counsel for the Disputant notably submitted that the Complainant's case is grounded on procedural aspects of the matter. Senior Counsel stated that the timeline of this case falls foul of *section 64 (2)(a)(i)* of the *WRA*, which must be read subject to *section 64 (3)*. The legislator does not act in vain and has provided for timeframes throughout the disciplinary process. However, no timeframe has been provided for how long an investigation can last. The complaint was received by Mr Nalletamby on 16 August 2023 as confirmed by Mrs Cavalot. On 31 August, the Disputant is suspended. The Respondent has transgressed *section 64 (2)* and *subsection (3)* cannot help them as it is only five weeks after the incident that the details of the complaint were actually put to Mr Auckle when he was given the letter dated 26 September 2023 convening him to the disciplinary committee. As there is a breach, the termination cannot stand and there must be reinstatement. However, if he cannot be reinstated, then severance allowance would apply.

Secondly, Senior Counsel submitted on the issue of fairness in relation to the enquiry. The enquiry necessitated five weeks before charges were laid and the Disputant was never interrogated. The Respondent was looking for people to corroborate the statement of Mrs Cavalot. There has been no fairness and there has been no enquiry in the first place. The third point is victimisation. The Disputant made a complaint which he was entitled to do so a day before the disciplinary committee. As per the letter of 29 December 2023, this complaint was taken into account by the Respondent in convening the Disputant to the disciplinary committee and is in breach of *section 64 (1)(e)* of the *WRA*. The fourth point is the lack of good faith when looking at the termination letter. Looking at the findings of the disciplinary committee (Document K), the employer may have well been swayed by the words of the Chairperson. As per the termination letter, the Respondent never took time to see whether the decision to terminate could be taken in good faith given the 29 years of unblemished service of the Disputant.

Learned Counsel for the Respondent, in his submissions, referred to the points of contention as set in the Disputant's Statement of Case. He stated that *section 64* of the *WRA* sets out what an employer has to do in a case of misconduct. The formal written complaint was made on 17 August 2023 when the investigation commenced and the suspension letter followed on 31 August 2023. The letter of suspension talks of '*... an alleged act of violence at work ...*'. The investigation is completed on 23 September 2023 and then we have the letter of charges. *Section 64* does not impose any requirements in law for the investigation. The law does not prescribe a manner for it to be completed as is being suggested. *Section 64 (2)* must be read subject to *subjection (3)*. The timeframe has been adhered to by the employer in commencing the investigation, thereafter laying charges for an alleged act of violence at work and fixing the disciplinary committee for 4 October 2023. The worker is given the opportunity to give his explanation before the disciplinary committee as the law provides, has full latitude to bring whatever evidence to defend himself and no such evidence was brought.

Regarding the second point raised by the Disputant, Counsel relied on *section 69 (9)* of the *WRA* pursuant to which the employer is precluded from relying on any evidence or written statement or material he would have gathered should Mr Auckle been called. In being asked to come before the disciplinary committee, the Disputant has all latitude to give his explanations. The judgment of *Moortoojakhan v Tropic Knits Ltd [2020 SCJ 343]* was referred to on the aim of the disciplinary committee and the findings thereof. The employer has adhered to the law and given the Disputant the opportunity to give explanations. On the third point, Counsel referred to

the letter dated 29 December 2023 and paragraph 2 thereof where the employer is saying that the complaint made of violence at work by Mr Auckle is not in their possession. The only conclusion to draw is that the complaint of violence at work was not escalated by Mr Auckle in his organisation. The Disputant should not have taken six weeks to file a complaint at the Labour Office. On the last two points made by Counsel for the Disputant, Counsel for the Respondent notably submitted that Mrs Chingen did explain that options were considered for Mr Auckle and that management could not deviate from the opinion of termination because of the risk it would represent for the company.

Counsel referred to the case of *Chellen and Airports of Mauritius Ltd (ERT/RN 98/23)*, which at page 8 of same aligns with the plea *in limine*. The Tribunal found that cases of reinstatement can only be determined by considering all relevant evidence including termination of employment. It was submitted that the Tribunal does not have the power to make such findings as when making a decision on reinstatement or severance allowance in the alternative, the Tribunal will have to see whether the termination was justified and that falls squarely within the remit of the Industrial Court. On the second point of the plea *in limine*, it was submitted that should the Tribunal make a finding against the Respondent, the latter would have to proceed by judicial review to challenge the decision. Counsel referred to a Law Reform Commission paper on the character of judicial review. A litigant is entitled to a right of appeal and the characterisation of judicial review is different from an appeal on the merits. Reference was notably made to paragraph 5 of the paper.

THE RESPONDENT'S PLEA IN LIMINE

The Respondent has raised a two-fold plea *in limine* in the present matter which was taken at the stage of submissions following of the hearing of the matter. This provides as follows:

The Respondent moves that the present matter which has been referred to the Employment Relations Tribunal (the 'Tribunal') pursuant to section 69A of the Workers' Rights Act 2019 (the 'WRA') be set aside inasmuch as:

- A. *The Tribunal holds no power to examine the process of dismissal and make any findings on termination in the same manner as the Industrial Court is mandated to do so.*

- B. *The Respondent is unfairly and unjustly prejudiced by being denied its ordinary right to appeal as governed by the WRA; this in favour of a judicial review which carries a higher threshold of receivability and would not be the appropriate remedy to the Respondent in the present case.*

Under the first limb of the plea *in limine*, the Respondent is moving for the present referral under *section 69A* of the WRA to be set aside as the Tribunal has no power to examine the process of dismissal and make any findings on termination in the same manner as the Industrial Court.

The objection raised warrants a thoughtful reflection of *section 69A* of the *Workers' Rights Act*. The material aspect of this particular section, which was originally enacted by the *Finance (Miscellaneous Provisions) Act 2022* and subsequently amended by *Act No. 12 of 2023*, reads as follows:

69A. Reinstatement

(1) *Where an employer terminates the employment of a worker for any reason, other than reasons related to reduction of workforce or closure of enterprises under Sub-part III, the worker may, instead of claiming severance allowance under section 69(4), register a complaint with the supervising officer to claim reinstatement.*

(2) *The supervising officer shall enquire into the complaint and where he is of the opinion that the worker has a bona fide case for reinstatement, he may refer the complaint to the Tribunal.*

A reading of *subsection (1)* notably reveals that a worker may register a complaint with the Supervising Officer to claim reinstatement where the employer has terminated his employment for any reason other than reasons related to reduction of workforce or closure of enterprises. It is apposite to note that the worker has been given ample latitude to register a complaint for reinstatement. This is in sharp contrast to the now repealed *section 64 (1A)* of the *Employment Relations Act*, whereby the worker could only report a dispute as to reinstatement on specific grounds. The words '*for any reason*' are deemed to be very wide in their ambit and reach.

It is apposite to note that with the enactment of *section 69A* of the *WRA*, the *Finance (Miscellaneous Provisions) Act 2022* has simultaneously amended the *First Schedule* of the *Industrial Court Act* as follows:

32. Industrial Court Act amended

The Industrial Court Act is amended, in the First Schedule, by deleting the following item –

Workers’ Rights Act 2019

and replacing it by the following item –

Workers’ Rights Act 2019 in so far as it does not relate to section 69A

As per *section 3* of the *Industrial Court Act*, the Industrial Court has exclusive civil and criminal jurisdiction over any matter arising out of the enactments which appear in its *First Schedule* (*vide Georges Mademaine & Ors v Scott Granary Company Ltd [2009 MR 184]*) and this includes the *WRA*. Despite the amendment made by the *Finance (Miscellaneous Provisions) Act 2022* to the *First Schedule*, the Industrial Court still retains its exclusive jurisdiction over matters arising out of the *WRA* with the proviso ‘*in so far as it does not relate to section 69A*’. Thus, matters arising out of *section 69A* cannot be subject to the exclusive jurisdiction of the Industrial Court.

When a referral is made pursuant to *section 69A*, the Tribunal is conferred jurisdiction over the claim for reinstatement in accordance with *section 70A* of the *Employment Relations Act*. The material aspect of this particular section reads as follows:

70A. Reference by supervising officer

(1) *Where the supervising officer refers a complaint to the Tribunal under section 69A of the Workers’ Rights Act 2019, the Tribunal shall proceed to hear the case and give its determination.*

It is apposite to note the Tribunal’s observation in *Chellen and Airports of Mauritius Co Ltd (supra)*, which has been cited by Counsel for the Respondent, in pronouncing on a similar preliminary objection raised as to its jurisdiction:

The Tribunal finds that unlike the Industrial Court, the jurisdiction of the Tribunal will be triggered only where there is a claim for reinstatement which has been referred to the Tribunal as per the requirements of the law. The Complainant will necessarily have to plead and pray for reinstatement (as opposed to merely averring that the termination of employment was unjustified) before the burden shifts on the employer to show, for example, that the termination of employment was justified so that reinstatement does not arise. In assessing whether reinstatement of a worker is justified, the Tribunal will have to consider some evidence in relation to the termination of employment. As per section 69A of the Workers' Rights Act, section 70A of the Employment Relations Act and the amendments brought to the Industrial Court Act (see above), the only plausible interpretation is that the legislator wanted to give jurisdiction to the Tribunal to hear "reinstatement" cases. The Tribunal finds that these cases can only be determined by considering all relevant evidence including the termination of employment. The Tribunal thus does not agree with the plea in limine as taken and finds that it can hear some evidence on the issue of whether the termination of employment was justified or not, so long as this relates to section 69A of the Workers' Rights Act. For the reasons given above, the plea in limine is thus set aside.

It is clear that the legislator has conferred jurisdiction on the Tribunal to hear matters of reinstatement under section 70A of the *Employment Relations Act* pursuant to a referral under section 69A of the *WRA*. As noted, under the latter section, a worker may register a complaint to claim reinstatement where an employer has terminated his employment for any reason, other than reasons relating to reduction of workforce or closure of enterprise.

Thus, the Respondent's contention that the Tribunal has no power to examine the process of dismissal and make findings on termination in the same manner as the Industrial Court is mandated to do cannot stand in light of the latitude afforded to a worker to register a complaint for reinstatement and the consequential amended made to the *Industrial Court Act* as noted above. It cannot also be overlooked that under section 70A (3) & (4) of the *Employment Relations Act* reference is made to the Tribunal finding that the claim for reinstatement of the worker is justified as opposed to finding that the dismissal of the worker is unjustified or not. The Tribunal cannot therefore find any merit in the first limb of the plea *in limine* and same is set aside.

Under the second limb of the plea *in limine* raised, it is being contended that the Respondent is being denied its ordinary right of appeal as governed by the *WRA* in favour of a

judicial review which carries a higher threshold of receivability and is not the appropriate remedy to the Respondent in the present case. Counsel for the Respondent has mostly relied on a paper from the Law Reform Commission in contending that a litigant is entitled to a right of appeal and that judicial review is different from an appeal on the merits.

One observation the Tribunal must make *ex-facie* the wordings of the particular objection is that the Respondent has pre-empted that the outcome Tribunal's determination in the present matter would not be in its favour. It cannot be denied that the judicial review of any eventual determination of the Tribunal arises when same has been delivered and cannot intervene at the stage where the Tribunal has yet to examine the merits of the claim for reinstatement referred to it. The second limb of the plea *in limine* raised therefore appears to be premature.

Moreover, the plea *in limine* alludes to an ordinary right of appeal as governed by the *WRA*. However, Counsel has not enlightened the Tribunal of any such right of appeal under the *WRA*. Although the Supervising Officer is seized of a complaint for reinstatement under the *WRA*, the Tribunal's jurisdiction to hear the matter and give its determination falls under the *Employment Relations Act* as has been previously noted. It is therefore misplaced to say that the Respondent's right of appeal, if ever there is one, should be governed by the *WRA*.

Despite the characterisation of judicial review set in Law Reform Commission paper relied by the Respondent, it must not be overlooked that the contents of the report are recommendations and do not reflect the actual state of the law. If ever a right of appeal were to exist against any award or determination of the Tribunal, same must be provided for by the National Assembly and it is not within the Tribunal's ambit to pronounce itself on same. The Tribunal's jurisdiction to hear and determine the present matter is by operation of law and not otherwise. The Tribunal cannot therefore find any merit in the second part of the plea *in limine* and same is set aside.

THE MERITS OF THE DISPUTE

The Disputant held the post of Welfare Manager at the Respondent Company and had 29 years of unblemished service prior to the incident leading to the termination of his employment. There was an incident in the Respondent's mess room between the Disputant and Mrs Cavalot

on 16 August 2023. The latter thereafter made an official complaint in the form of a written statement on 17 August 2023. By letter dated 31 August 2023 signed by Mrs Chingen, the Disputant was suspended pending the determination of an enquiry following a complaint made by an employee for an alleged act of violence at work. On 26 September 2023, he received a letter of charges whereby he was informed that the investigation was completed and was convened to a disciplinary committee on 4 October 2023. On the aforesaid date, the disciplinary committee was postponed to allow parties to find a settlement. A day before the sitting of the committee, he reported a complaint to the Labour Office on the incident and on his suspension at work. On 29 December 2023, he received another letter from Mrs Chingen convening him to the disciplinary committee rescheduled for 8 January 2024. Mrs Cavalot and two other witnesses deponed and the Disputant also gave his version at the disciplinary hearing. On 12 January 2024, the Disputant received a letter informing him that his employment is being terminated. In the present matter, the Disputant contends that his termination of employment was unlawful and unjustified putting forward four grounds in support.

The Disputant first contends that he was not notified of the charges within the time frame of 10 days as provided under *section 64 (2)(a)(i)* of the *WRA*. It has not been disputed that Mrs Cavalot made an official complaint to the Respondent on 17 August 2023 as per the written statement of the same date (Document G). This is deemed to be the date the Respondent becomes aware of the incident in the mess room on 16 August 2023. The Respondent now had within 10 days to notify the Disputant of the charge to be made against him. This may amply be gleaned from the following provision:

64. Protection against termination of agreement

...

(2) *Subject to subsection (3), no employer shall terminate a worker's agreement –*

(a) *for reasons related to the worker's alleged misconduct, unless –*

(i) *the employer has, within 10 days of the day on which he becomes aware of the alleged misconduct, notified the worker of the charge made against the worker;*

However, the Respondent gives the Disputant a suspension letter on 31 August 2023 (Document A) informing him *inter alia* of an investigation into an incident. The material part of this letter reads as follows:

The Management of Princes Tuna (Mauritius) Limited (the “Company”) has been apprised of a complaint made by an employee of the Company in relation to an alleged act of “violence at work” pursuant to section 114 of the WRA, which may have been committed by you. An investigation is accordingly being carried out into the matter.

In view of the gravity of the complaint, the Management has decided to suspend you with pay pursuant to the provisions of the WRA pending the completion of the enquiry.

Thereafter, the Disputant is informed of the charges laid against him as per letter dated 26 September 2023 (Document B), which *inter alia* states, as per the first charge, that he insulted and humiliated Mrs Cavalot in the mess room on 16 August 2023; and is convened to a disciplinary committee to be held on 4 October 2023. It is thus clear that the Disputant was informed of the charges more than 10 days after the Respondent was officially made aware of the incident.

As submitted by both Counsel, *section 64 (2)* of the WRA is to be read subject to *subsection (3)*. *Section 64 (3)* provides as follows:

(3) Before a charge of alleged misconduct is levelled against a worker, an employer may carry out an investigation into all the circumstances of the case and the period specified in subsection (2)(a)(i) or (b)(i) shall not commence to run until the completion of the investigation.

It can thus be seen that the employer is not precluded from carrying out an investigation before levelling a charge of misconduct and the period under *section 64 (2)(a)(i)* cannot start to run until the investigation is complete. As per the submissions of Counsel for the Respondent, the investigation commenced on 17 August 2023 and was completed on 23 September 2023. The date of completion of the internal investigation is also mentioned in the letter of charges. The Respondent had within 10 days to notify the Disputant of the charges from 17 August 2023 but did only do so on 26 September 2023 contending that the *section 64* does not impose any requirement in law regarding the investigation and that *section 64 (2)* must be read subject to *subsection (3)*.

Given that the Respondent had a statutory duty to notify the Disputant of the charges within 10 days of becoming aware of the incident, it was unreasonable for the Respondent to have waited until the 31 August 2023 to inform the Disputant that an investigation is being carried out. As the law clearly provides that the 10 day time period will not commence to run until the completion of the investigation, the Respondent should have duly notified the Disputant that it was carrying out an investigation into the matter as soon as practical preferably within the 10 days so that the Disputant would have been aware that the period for charges to be laid against him have been put in abeyance.

Although this is not specifically mentioned in *section 64* of the WRA, it must be borne in mind that labour laws are of public order as has been noted by *Dr D. Fok Kan* as cited in *Atchia v Air Mauritius Ltd (under administration)* [2021 SCJ 206]:

*As is aptly explained in the following extracts from **Introduction au droit du travail mauricien 1/Les Relations Individuelles de Travail, Dr D. Fok Kan, 2ème édition (2009)** at p.1:*

“Le droit du travail concerne seulement les contrats de louage des gens de travail qui selon l’art. 1780 sont régis par le Labour Act. Le droit du travail est ainsi perçu ici comme étant un contrat. Il s’agit du “droit qui gouverne les rapports juridiques naissant de l’accomplissement par un travailleur subordonné d’un travail pour le compte d’autrui”. Nous sommes ici dans le cadre des relations individuelles qui existent entre un employeur et chacun des employés individuellement. Ces relations sont ainsi régies par le contrat de travail de chacun de ces employés, sujettes éventuellement aux dispositions impératives de la loi.”

The contract of employment between an employer and a worker is therefore imperatively governed by the applicable provisions of the law as enacted by the legislator. The learned author (supra) goes on to explain at pages 2 and 5 that:

“Si en droit privé, la loi a normalement seulement pour but de prévoir un cadre à l’intérieur duquel c’est aux parties elles-mêmes d’organiser leurs affaires, le droit du travail lui par contre à une finalité précise, celle de “la protection du faible contre le fort” [Droit du travail, J. Rivero et J. Savatier, Collection Thémis, 12ème ed. (1991), p. 32]

“Ces diverses interventions du législateur mauricien, soit de sa propre initiative ou soit pour se conformer aux conventions de l’OIT, démontrent bien que la finalité du droit du travail auquel se réfèrent Rivero et Savatier est bien la protection du faible contre le fort. Les législations du travail sont ainsi à ce titre des législations d’ordre public.”

The purpose of labour legislation being the protection of the weak against the strong, i.e. the protection of the worker against the employer, it would not be in order for the employer to be given an indefinite period to conduct an investigation and thereby attempt to suspend the period for it to notify of any charges it wishes to bring against the worker for an unreasonable period. As submitted by Learned Senior Counsel for the Disputant, that could not have been the intention of the legislator.

The Tribunal can only therefore find that the Respondent has acted contrary to the provisions of *section 64 (2)(a)(i)* of the WRA in notifying the Disputant of the charges on 26 September 2023 and considering that the Disputant was only informed of the investigation on 31 August 2023, *section 64 (3)* cannot come to its aid.

In the circumstances, it is apposite to note the following from the judgment of *Happy World Marketing Ltd v Agathe* [2004 MR 37]:

In this connection, we may refer to paragraph 11(3) of the International Labour Organisation Recommendation No. 119 which states as follows –

“An employer shall be deemed to have waived his right to dismiss for serious misconduct if such action has not been taken within a reasonable time after he has become aware of the serious misconduct”.

The Disputant has also raised the point that he was victimised by the Respondent in being called to attend a disciplinary committee on 8 January 2024 because of the complaint he made at the Labour Office on 3 October 2023. Reliance has been placed on the letter dated 29 December 2023 (Document E). The material aspect of this letter reads as follows:

The Management of Princes Tuna (Mauritius) Limited (the “Company”) refers to the letter of charges dated 26th September 2023 (the “Letter of Charges”) whereby you

were convened to a disciplinary committee on 4th October 2023, after 7 days of being notified of the charges.

Management has duly considered:

1. Your request made to the Company on 4th October 2023, under section 64 (8) of the Workers' Rights Act 2019, in an attempt to promote a settlement; and
2. Your complaint of violence at work which you have made at the Ministry of Labour, Human Resource Development and Training against Ms. Sandrine Cavalot, which came to the attention of Management on 10th October 2023. This complaint is still not in our possession.

In the circumstances, it is now imperative that Management affords you the opportunity, to make appropriate representations before a Disciplinary Hearing as intended by law.

The Disciplinary Committee has accordingly been rescheduled to **Monday, 8th January 2023** at **14:00** at Temple Court, Rue Labourdonnais, Port Louis, to afford you an opportunity to provide your explanations as to the charges levelled in the Letter of Charges.

A careful perusal of this letter shows that the Disputant is being convened to a disciplinary committee to be held on 8 January 2024. Even though there is a typo as to the year, it is not disputed that the disciplinary hearing took place on the aforesaid date. It can be amply gathered from the letter that one of the Respondent's considerations in convening the Disputant to the disciplinary committee is the complaint of violence at work made by him to the Ministry of Labour. Although the Respondent has mentioned that the complaint is not in their possession, this cannot detract from the fact that the Disputant's complaint was a consideration as per the letter itself.

Counsel for the Respondent submitted that the only conclusion to draw is that the complaint of violence at work was not escalated by Mr Auckle in his organisation. If ever this was the interpretation that was to be given to the phrase '*This complaint is still not in our possession.*', the letter should have been more explicit. It should also be noted that the no evidence was adduced by the Respondent on this particular part of this letter. The Tribunal cannot therefore agree with the submissions of Counsel on this score.

The law expressly provides that an employer cannot terminate an agreement by reason of a worker, in good faith, filing a complaint against the employer. This can be amply gathered from *section 64 (1)(e)* of the WRA:

64. Protection against termination of agreement

- (1) *An agreement shall not be terminated by an employer by reason of –*
...
(e) *a worker, in good faith, filing a complaint, or participating in proceedings, against an employer, involving alleged breach of any terms and conditions of employment;*

As per the letter dated 29 December 2023, the Disputant's complaint to the Ministry of Labour was one of the reasons mentioned in convening him before the disciplinary committee. This however is not the letter which informs the Disputant of his termination of employment. The Disputant was so informed by letter dated 12 January 2024 (Document H), which makes no mention of the Disputant's complaint to the Labour Office in the termination of his contract of employment. It would not therefore be reasonable for the Tribunal to infer that the Disputant's employment was terminated because of the complaint he made. The Tribunal thus cannot find this particular ground to be valid in its determination of the present matter.

Another pertinent ground raised by the Disputant concerns whether the Respondent took the decision of termination in good faith as required by law. In this regard, the following must be noted from the letter of termination dated 12 January 2024:

In these circumstances, the Management of the Company has decided that a measure such as reintegration as though no incident arose is not a viable solution. It shall have no other alternative in light of your position than to terminate your contract of employment with immediate effect.

When effecting termination of the worker's agreement for any alleged misconduct, the employer must ensure that it cannot in good faith take any other course of action. This is amply reflected in *section 64 (2)(a)(iv)* of the WRA:

64. Protection against termination of agreement

- ...
(2) *Subject to subsection (3), no employer shall terminate a worker's agreement –*

- (a) *for reasons related to the worker's alleged misconduct, unless*
–
...
(iv) *the employer cannot in good faith take any other course of action; ...*

As per the reproduced paragraph of the termination letter, the Respondent has simply stated that it shall have no other alternative than to terminate the Disputant's contract of employment. However, the Respondent's witness, Mrs Chingen agreed that the employer has a duty to ask itself whether it can terminate the employment in good faith and was adamant that management had explored all avenues before reaching the decision.

It is apposite to note the following from the Judicial Committee of the Privy Council judgment in *United Docks Ltd v De Speville* [2019] UKPC 28 on the element of good faith in the context of termination of employment:

24. *A question whether the company had a valid reason to dismiss the respondent is obviously different from a question whether it could not in good faith take any other course than to dismiss him. The former asks only whether the misconduct was a ground for dismissing him. The latter asks whether in all the surrounding circumstances the only course reasonably open to the employer was to dismiss him. In other words, was it, as the Board said in para 17 of its judgment in Bissonauth v The Sugar Fund Insurance Bond [2007] UKPC 17, "the only option"?*

25. ... *It suffices to say no more than that the Board sees no reason to interfere with the Supreme Court's conclusion that the company had failed to establish that it could not in good faith take any other course than to dismiss the respondent.*
(The underlining is ours.)

The following may also be noted from what stated by the Industrial Court in *Ramessur v CIM Finance* (2023 IND 53) regarding the requirement of the employer deciding in good faith:

That being said, the Court is of the considered view that the duty placed on the employer to act in good faith, when it comes to the termination of employment of an employee, is one of substance rather than one of form.

It is clear that the letter of termination does not expressly reflect the requirements of the law of whether the employer could not in good faith take any other course of action. Despite the Respondent's contention that all avenues have been explored before taking the decision, this is not precisely what the law is asking the Respondent to do and is also not reflected in the letter of termination. It was incumbent on the Respondent to see whether in all the surrounding circumstances, the only course reasonably open to it was to dismiss the worker. In the circumstances, the Tribunal cannot find that the termination of the Disputant's employment was properly effected as per the requirements of the law.

In having found that the Respondent did not notify the Disputant of the charges within the statutory time frame and that the Respondent did not effect the termination in accordance with the law, the Tribunal does not find it necessary to consider the remaining ground put forward by the Disputant regarding the fairness of the investigation. The Tribunal can only therefore find that the Disputant's reinstatement is justified.

As the Disputant's reinstatement has been found to be justified, the Tribunal must now determine whether it can order that the Disputant be reinstated to his former position of Welfare Manager. In this respect, it would be appropriate to refer to *section 70A (3) & (4)* of the *Employment Relations Act*:

70A. Referral by supervising officer

...

(3) *Where the Tribunal finds that the claim for reinstatement of a worker is justified, the Tribunal shall –*

(a) *subject, to the consent of the worker; and*

(a) *where it has reason to believe that the relationship between the employer and the worker has not irretrievably been broken,*

order that the worker be reinstated in his former employment and, where it deems appropriate, make an order for the payment of remuneration from the date of the termination of his employment to the date of his reinstatement.

(4) *Notwithstanding subsection (3), where the Tribunal finds that the claim for reinstatement of a worker is justified but the Tribunal has reason to believe that the relationship between the employer and the worker has irretrievably been*

broken, it shall order that the worker be paid severance allowance at the rate specified in section 70(1) of the Workers' Rights Act 2019.

It is incumbent on the Tribunal, in deciding whether to make an order for reinstatement, to ascertain that the relationship between the Disputant and the Respondent has not irretrievably been broken. Although the Disputant did not expressly depose as to the state of the relationship with the Respondent, he did aver in his Statement of Case that he is still on good terms with his colleagues at the company and despite disagreeing with the conduct of management, they still share mutual respect and he verily believes that his reinstatement would be beneficial to both parties. This stance is consistent to his response, when cross-examined, that he is still on good terms with his colleagues and that they want to see him back at canteen level. On the other hand, Mrs Chingen for the Respondent categorically stated that as Welfare Manager, the Disputant had a responsibility to look after the welfare of employees and if the Welfare Manager has acted this way, this has broken the trust.

Although the Disputant verily believes that he is still on good terms with his colleagues, the relationship that must be considered is that between the Disputant and his employer. The Disputant has adduced scant evidence on this score and it is not feasible to confound his colleagues with the Respondent itself. Besides, the Respondent's evidence that the trust has been broken has not been challenged. The Tribunal can only therefore conclude that it has reason to believe that the relationship between the Disputant and the Respondent has irretrievably been broken and consequently it cannot order the Disputant's reinstatement.

Pursuant to *section 70A (4) of the Employment Relations Act*, the Tribunal orders that the Disputant be paid severance allowance at the rate specified in *section 70 (1) of the WRA*.

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

.....
(SD) Parsooram A. Ramasawmy
(Member)

.....
(SD) Chetanand K. Bundhoo
(Member)

.....
(SD) Muhammad Nayid Simrick
(Member)

Date: 17th April 2024