

ARBITRATION OF LABOUR DISPUTES IN MAURITIUS*

1 Part I: Historical background

A remote island in the Indian Ocean surrounded by a blue lagoon was first discovered by the Arabs followed by the Europeans; the Dutch, the French and the British. It was the Dutch that gave the island the name “Mauritius” during the 16th century. The 17th century was marked by the introduction of French labour law under the Napoleon era.

The evolution of labour law on the island started with the repeal of the “code noir” (literally the black code) which was introduced in France in 1685 and extended to the island in 1723. It contained inhumane provisions that treated a slave as merchandise, as the property of his master which was subject to a list of punishments for not obeying the orders of the latter. Freedom of movement was then a crime.

The British took over the island from the French in 1810. Article 8 of the *Traité de Capitulation* (Act of Capitulation), signed in 1820, provided that the British undertake to preserve the French laws, customs and traditions. With economic development, industrial relations law from Britain found its way to Mauritius.

Slavery was finally abolished in 1833. Mauritius introduced a series of legislations, regulations and executive policies that granted greater freedom to the Indian immigrant workers who were brought to the island as cheap labour, with the exception of Indian traders coming from Gujarat.

According to Fok Kan, a Mauritian author on labour law, the main objective of labour law and hence arbitration is “*la protection des faibles contre les forts*” (the protection of the weak as against the mighty strong; Fok Kan *Introduction as Droit du Travail Mauricien, Les Relations Individuelles de Travail* (2009) 2).

In the wake of the industrial unrests of 1937, the British colonial government set up the Labour Department and the Labour Administration Service following the recommendations of the Hooper Commission of Enquiry in 1938. In that year the Industrial Associations Ordinance was introduced which allowed workers to form associations for the first time; unionism was previously an offence.

In 1968, Mauritius became independent. It inherited a bilingual legal source – French and English. Consequently, Mauritius became a mixed legal system where French and English laws work as a marriage, sometimes

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harmoniously together, at other times falling apart. The area of labour law is no exception.

Unfortunately, Mauritius, a newly born independent nation, was crippled by a series of strikes in almost all sectors of the economy in the early 70's. In his book *Political History of Mauritius, Recollections and Reflections*, Moonindra Nath Varma, a political historian, writes–

“[s]ome 716 buses were off the road and around 75,000 people deprived of transport ... Economic and social activities were reduced. Mauritius stood almost at a standstill.”

“[C]onciliatory meetings had ended in deadlock due to obstinacy, arrogance and the idea of confrontation. The Government now applied the Public Order Act. Anyone inciting workers for an illegal strike was to be detained ...” (Varma *Political History of Mauritius, Recollections and Reflections* (2011) 205)

The strike in the transport sector started spreading like cancer to other sectors, reaching the Central Electricity Department, the ports authority and the sugar industry – the economic pillar of the country. The strikes continued with disastrous consequences with ships and unloaded goods remaining immobilised in the harbour and having to be rerouted to the neighbouring island, Reunion Island.

Meanwhile, in Britain, strikes known as the British disease led to the introduction of the Industrial Relations Act of 1971 by the Conservative government. The Secretary of State stated that the objective of the Act was–

“[e]ssentially about regulating the eternal tension between on the one hand of the individual person and group for complete freedom of action, and on the other hand the need of the community for a proper degree of order and discipline”.

He added that the law was a vital element in the longer-term strategy for dealing with the underlying problem of achieving steady and sustainable growth.

In Mauritius, the then Minister of Labour and Social Security presented the Industrial Relations Act 1973 as the response–

“[t]o the consistent demand for more effective communication and more industrial democracy, and to the concepts and the legitimate aspiration of a modern society”.

The events of the early 1970s demonstrate that the objectives of the Mauritian government were similar to those of the British government.

2 Part II: The law

Mauritian labour law is enriched by 300 years of case law while there is, unfortunately, little case law relating to industrial relations. In the absence of local case law, the tradition is to seek guidance from appropriate English or French law. Whenever a piece of legislation is borrowed from French or English law, it ceases to be French or English and becomes Mauritian law (*R v Shummoogum* 1977 MR 1).

Whether it is for French or English cases, it must be stressed that these are not strictly speaking precedents, though admittedly they are very often of persuasive authority. They are only to be referred to for guidance. This point is of special importance in the context of industrial law where the influence of various factors in modelling the system of collective bargaining and the mechanism for the resolution of industrial disputes cannot be overstated. Mauritius has had an economic and social history different from that of England and France; solutions appropriate there may very often not be applicable in Mauritius. Guidance is, therefore, to be sought from other sources as well. One such source is the laws of the United States, the relevance of which is to be explained by the fact that the English Industrial Relations Act of 1971, which inspired the Mauritian Industrial Relations Act of 1973, aimed at introducing American style industrial relations in Britain.

Another possible source is South African law. The first legislation in the labour field, namely the Industrial Associations Ordinance 1938, was of South African origin. It is believed that this South African origin cannot be ignored in an attempt to determine what the Mauritian law is, since in the context of the regulation of industrial disputes, the Industrial Relations Act of 1973 contains many of the features of the Industrial Association Ordinance of 1938.

The Industrial Relations Act 1973 established an independent body called the Permanent Arbitration Tribunal with the main function of settling industrial disputes through the process of arbitration. From 1938 to 1954, the Arbitrator had been appointed on an *ad hoc* basis. An Arbitration Tribunal was first set up under the Trade Disputes Ordinance of 1954 and carried on its function under the Industrial Relations Act 1973. While the British Industrial Relations Act of 1971 provided for the setting up of a National Industrial Relations Court to be presided over by a High Court Judge, the Mauritian Industrial Relations Act of 1973 stipulated that no one is to be appointed president or vice-president of the Tribunal unless he is qualified for appointment as a judge of the Supreme Court.

For the setting up of that Tribunal, a judge resigned from the Supreme Court to take office as the first president. Alongside the Tribunal, the Act also established a Civil Service Arbitration Tribunal for the public service and civil service unions. The Permanent Arbitration Tribunal and the Civil Service Arbitration Tribunal were later merged as one with the setting up of the Employment Relations Tribunal in 2009 under the Employment Relations Act of 2008. Consequently, there was no longer a distinction between public and private sector labour disputes.

Sir Henry Garrioch, a Chief Justice in Mauritius foresaw as far back as 1976 in the case of *Union of Labourers of the Sugar and Tea Industries v Permanent Arbitration Tribunal*—

“[t]he Tribunal is by its Constitution the main arbiter in the sphere of industrial relations. It is or is expected to become with time and experience, an expert body in that sphere ...”

Time has witnessed the virtuous words of the then Chief Justice to have become a reality.

With recent developments in the field of industrial relations and information communication technology and as the government embarks further in modernising and amending employment laws, the role of the Tribunal will increase in the future. Indeed, with globalisation and the unprecedented financial crisis of 2007 and the yet persisting insecure state of the economy in the Eurozone, in relation to Brexit, the Mauritian economy is not immune from a downturn. In any crisis, those at the lower levels of the economy are the ones to suffer the most and workers are particularly at risk. Good employment laws and relations are more than ever crucial in this era of uncertainty, and the role and responsibility of the Tribunal through the arbitration that it performs are *sine qua non* to ensure peace, social stability and economic development.

3 Part III: Arbitration

Arbitration is a form of alternate dispute resolution. It resolves disputes through the issuing of an award that becomes binding on the parties and enforceable in the courts. The Tribunal deals with both voluntary and statutory arbitration. In the latter case, the Commission for Conciliation and Mediation has the power to refer an unresolved labour dispute of an individual for arbitration before the Tribunal if the latter consents to it. Although some common principles of arbitration may hail from international arbitration principles and the Code de Procédure Civile, the arbitration before the Tribunal emanates from the statutory provision of the Employment Relations Act of 2008 where further considerations may be taken into account in deciding over any dispute as per section 97 of the Act. These considerations include the need to promote decent work and decent living, the need to ensure the continued ability of the government to finance development programmes and recurrent expenditure in the public sector, the capacity to pay of enterprises and the principles of natural justice and best practices of good employment relations, amongst others.

Labour disputes are classified as disputes of rights (i.e. as to legal rights), which relate to the application of existing collective agreements or contracts of employment and disputes of interests (i.e. economic disputes) which relate to claims by workers or proposals by management about terms and conditions of employment. A labour dispute is defined in the Act as "a dispute between a worker, or a recognised trade union of workers, or a joint negotiating panel, and an employer which relates wholly or mainly to wages, terms and conditions of employment, promotion, allocation of work between workers and groups of workers, reinstatement or suspension of employment of a worker". It does not include a dispute where a worker has opted for a salary review report and also where a dispute is reported more than three years after the act or omission that gave rise to it.

Earlier this year the Tribunal had to hear a dispute in which an employee who had been working as a sales assistant in a five-star hotel, was prevented from wearing a tikka on the work premises (see *S. Dalwhoor and The Residence Hotel* (ERT/RN 77/18)). A tikka is a red paper sticker which is applied to the middle of a lady's forehead to symbolise her sacred marital status. Initially, the contract of employment of the employee did not contain any such prohibition. The Tribunal noted that the wearing of the tikka by the

employee in no way affects the operations of the hotel as the employee does not deal with food in the course of her duties but only sells beachwear in a separate department. The Tribunal condemned the manner in which the employer imposed such prohibition the wearing of the tikka, on its employees and remarked–

“On the whole the Tribunal cannot but adopt the view that the communication of such an ‘important and sensitive’ issue should not have been via a mere display on notice boards at the entrance of the canteen of the Hotel ... At the training sessions, management could have assured itself that every employee is apprised of such policy change by requiring them to sign a circular if it considered its decision to be an important one”.

The Tribunal decided in favour of the employee based on a provision of the Code of Practice included in the second schedule of the Employment Relations Act. This provision prevents employers from making impersonal forms of communication when dealing with important and sensitive issues. The Tribunal and the Commission for Conciliation and Mediation have the discretion to consider provisions of the Code of Practice when relevant to an issue at hand. This Code, in a nutshell, provides practical guidance for the promotion of good employment relations.

In the above-mentioned case, the Tribunal based itself on principles of fairness to limit the employer’s power to regulate if it is disproportionately abusive. In the spirit of compassion and understanding, the Tribunal made a humble appeal to the Respondent.

“We believe Management will go out of their way to provide the best working environment. However, in striving obsessively to maintain a five star hotel standard, it should not turn the resort into a military zone. Rally the people around and get their consensus when it comes to sensitive issues”.

The Tribunal also referred to a finding by Professor G. Dumbara of the University of Petrosani, Romania, in his research on *Workplace Relations and Emotional Intelligence*:

“We cannot leave our emotions at home because they are part of our unique status as human beings and, therefore, situations in which we cannot express our feelings are stressful.” (Dumbara *Workplace Relations and Emotional Intelligence* (2012))

The flexibility associated with arbitration, whether procedural or substantive, is what makes it the ideal mechanism to redress such grievances; grievances which a court of law is not suited to look at. Arbitration is what keeps the thread of employment relations going, however thin it may at times get. The writer referred to marriage earlier.

With these words, the writer hopes to have imparted the importance of arbitration when it comes to labour disputes as well as what considerations an effective arbitration needs to take – those found in section 97 of the Employment Relations Act of 2008 and the Code of Practice as explained previously.

The application of these considerations can be demonstrated in another case delivered by the Tribunal in 2017– *Subratty v Financial Services*

Commission (ERT/RN 14/17) in which the balancing exercise characteristic of an effective arbitration can be gleaned from this passage of the Award–

“The Respondent decided on two actions simultaneously: the demotion and the suspension ... the suspension came after the disciplinary hearing ... and it therefore amounts to a sanction. This is against the principle of double sanctions for a wrong doing (*Non bis in idem*) ...

...Granted that the Disputant may not have been a star employee, but such abuse of power on the part of Respondent offends the fundamental principles of fair employment”.

A case where the Tribunal had to consider purely economic and financial factors is *High Security Guards and Mauritius Private Security Guard Employees Union* (RN 692) where the then Permanent Arbitration Tribunal delivered an award that cut down the increase in wages of 36% recommended by the National Remuneration Board to 15% on the grounds that the disputant companies would face an imminent closure of business due to their inability to pay – a purely financial consideration.

The Tribunal held:

“The principle that the ultimate aim should be, and this, while preserving employment, that a worker is entitled to a fair day’s pay for a fair day’s work. It is obvious that the salary increase ... cannot be granted without signing effectively the death warrant of security guards companies in this country ...”

The Employment Relations Act, which is the main legislation providing for arbitration of labour disputes, provides for specific conditions to be met before an arbitration reaches the Tribunal: the case must first be referred for conciliation and mediation. Before a dispute is reported to the Commission for Conciliation and Mediation, the president of the Commission shall ensure that the parties have reached a stage of deadlock after meaningful negotiations lasting 90 days or less. Conciliation may be performed at this stage by the supervising officer at the Ministry of Labour well before the matter reaches the Commission for Conciliation and Mediation (the CCM). On the whole, the Act ensures that only genuine disputes reach the Tribunal for the arbitration process.

The conditions for arbitration are well-defined, and the spirit of the law is to streamline the arbitration process and not to overwhelm the business of the Tribunal. The Tribunal makes time limits a priority so that the arbitration of a labour dispute does not bring to a standstill the business of the employer i.e. the specific statutory delay of 90 days for the resolution of “labour disputes”, 30 days for determining a contention on recognition of a trade union, amongst other statutory time limits.

Another point worth noting is that any arbitration conducted by the Tribunal is in the presence of a representative of workers, a representative of employers and an independent member. They ensure that diverse perspectives are considered when making a decision. After all, their mere presence creates a perception of fairness and impartiality in the minds of the parties before the Tribunal.

4 Part IV: Procedure and evidence

The Employment Relations Act gives discretion to the Tribunal to “conduct its proceedings in a manner it deems appropriate in order to determine any matter before it fairly and promptly and may deal with the substantial merits of such matter with a minimum of legal formalities”. This provision mirrors that of section 138(1) of the Labour Relations Act of South Africa.

However, that does not mean that a quasi-judicial body does not adhere to the prescribed norms that guarantee a proceeding that is both fair and perceived as fair. The law provides for any member of the Employment Relations Tribunal who has an interest in a matter before the Tribunal to refrain from taking part in the proceedings. In addition, another constitutional principle that is guaranteed to any person whose right may be affected in a proceeding is the right to be assisted by counsel. In fact, the provision goes further by enabling a party to be assisted by a representative of a trade union and “such other persons at the discretion of the Tribunal”. This provision ensures that the arbitration process does not become too legalistic.

It is often that the case before the Tribunal is at a pro forma stage or “mention” stage, and counsel for the respondent will raise a plea *in limine*. The Tribunal will then ask the disputant, who would have conducted the case himself, if he wished to be assisted by counsel to argue on the preliminary point. In the absence of any argument in law during the proceedings, parties are allowed to be represented by a union negotiator who would be allowed to examine the disputant, cross-examine the representative of the employer and re-examine if need be, with a proviso that the negotiator will not be able to make any submission in law. In short, flexibility is allowed provided that it does not impinge on the basic tenets of an impartial and fair hearing.

The need to respect time limits (as previously mentioned) does not mean that proceedings are conducted in a disorderly, or at most, an informal manner. Preliminary meetings are not held for parties to be allowed the opportunity to exchange pleadings. In addition, for the issues in dispute to be narrowed down in order to expedite matters, the preliminary meetings allow arbitrators the opportunity to settle matters between parties by inviting them to a conciliation or mediation process while respecting their rights of being afforded a hearing. A distinct provision of the Employment Relations Act 2008, as amended, allows the Tribunal to exercise its jurisdiction to explore “other possibilities for conciliation and mediation”— that is other than referring the dispute back to the Commission for Conciliation and Mediation.

Similarly, when it is said that the Tribunal “conduct(s) its proceedings in a manner it deems appropriate” that does not mean that the arbitrators actively intervene in the proceedings just for the sake of expeditiousness. Parties do retain the sole discretion to conduct their cases provided that the fairness of trial is maintained. The procedure is to a large extent adversarial, and the role of the judge remains passive though he/she will intervene in the interests of parties when their rights are being infringed.

Arbitration represents the top end of the Alternate Dispute Resolution scale. As we travel along with that scale, passing by conciliation and

mediation, flexibility decreases and formalism increases. In other words, things get more serious if not more contentious. The more so as arbitration performed by the Tribunal is statutorily provided for and the outcome is a binding award; it closes the doors to any other forum of adjudication. The writer's point here is that arbitration conducted by the Tribunal cannot be effective if it is not empowered to enforce its orders and undertake its proceedings in the way it considers necessary to ensure a fair hearing. This view is aptly set out in the words of Mr Casper Lötter, attorney at law (*Labour Dispute Resolution*) in his analysis on the powers of the Commission for Conciliation, Mediation and Arbitration of South Africa as it provides a starting point for comparison with the powers of the Employment Relations Tribunal—

“When an institution is tasked with an adjudicatory function, its authority and dignity must be protected to enable it to perform them. The legislator (of the Labour Relations Act of South Africa) clearly wished to protect the dignity and repute of the Commission in the interests of an effective dispute resolution. To that end it has decreed that the same rules which apply in courts of law apply to the CCMA”. (Brand, Lötter, Steadman and Ngcukaitobi *Labour Dispute Resolution* (1997) 126)

The author in the same line enumerates the various powers (Brand *et al* *Labour Dispute Resolution* 126) entrusted to the CCMA. It is submitted that the Employment Relations Act also provide *inter alia* for the power of the Tribunal to obtain the attendance of a person before it, whether to depone and to produce documents before it. The Tribunal also administers an oath before witnesses give evidence and the Act makes perjury an offence. It is similarly an offence if one fails to obey any order given by the Tribunal. Failure to appear provides the Tribunal with the right to proceed with the matter in his absence, adjourn the proceedings or even dismiss the matter. Wilful interruption of the proceedings constitutes an offence, and the Act goes as far as coining the concept of “contempt of the Tribunal”.

With regard to evidence, paragraph 20(1) of the second schedule to the Employment Relations Act stipulates that the Tribunal should not be bound by the law of evidence in force in Mauritius. However, minimum evidential rules are observed to allow the Tribunal to rely on credible proof. For example, the rule against self-incrimination where a party refuses to answer incriminating questions is preserved.

All relevant facts must be proved. If evidence thereof is admissible, it will be taken into consideration in the proceedings. All possible irrelevant matters are discussed and weighed accordingly. This occurs mostly at the pro forma stage, where its importance from an evidential point of view is determined.

It is tried as far as possible to supplement items of real evidence by the deposition of witnesses. At any rate, the Tribunal will not interrupt proceedings unnecessarily by getting into complex arguments on hearsay and admissibility because in the end, what matters is the weight attached to the evidence.

All that can be inferred from the way the Tribunal has come to tackle the rules concerning admissibility of evidence is that it reconciles the flexibility desired of an arbitration proceeding and the need to protect the rights of

parties from having their cases damaged by manufactured and questionable evidence.

5 Conclusion

To conclude, Mauritian labour legislation and consequently, the arbitration of labour disputes did not merely appear but are the product of fruitful considerations. It emerged as carefully devised responses to address the prevailing tensions that unfolded in the years leading to independence and following it. They were forged out of legislation that stood the test of time in other countries and with experience have come to counter and redress the fallouts of industrialisation that leads to industrial disputes in those advanced economies.

Arbitration has come to establish itself as the most appropriate dispute settlement procedure to further the aims of such labour legislation. Key considerations are to provide redress to the aggrieved expeditiously, with a minimum of formalism while keeping the thread of employment relations intact and with a distinguished focus on principles and considerations of good employment relations.

The Tribunal, being statutorily the primary arbiter of industrial disputes in Mauritius, has wide powers provided under the Employment Relations Act. And yet it does not see itself as a sanctioning body, but rather the bridge that supports and improves harmonious industrial relations between management and employees.

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