

The Seychelles Employment Tribunal: The drafting history of the Employment (Amendment) Act of 2008 and its relevancy to understanding the work of the Tribunal

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SUMMARY

In 1995, the National Assembly of Seychelles passed the Employment Act. However, the 1995 Act did not establish the Employment Tribunal. It is against this background that on 8 September 2008, the Employment (Amendment) Bill, was published in the Official Gazette. The bill was debated and passed in the National Assembly on 30 September 2008. It was assented to by the President a few days thereafter, that is, on 8 October 2008 and published in the official gazette on 13 October 2008 and it became the Employment Amendment Act (No. 21 of 2008). Immediately thereafter, the Employment Tribunal started its work. Since the coming into force of the Employment (Amendment) Act, the Tribunal, the Supreme Court and the Court of Appeal have developed rich jurisprudence on the application and interpretation of the Employment (Amendment) Act. However, in this jurisprudence, none of these institutions rely on the drafting history of the Employment (Amendment) Act although case law shows that there are instances in which Seychellois courts have referred to Hansard in interpreting legislation for the purpose of determining “legislative intent.” In this article, the author relies on the drafting history of the Employment (Amendment) Act and in particular the Employment (Amendment) Bill (2008) and the verbatim debates of the National Assembly (Hansard) to argue that the manner in which the Tribunal, the Supreme Court or Court of Appeal have interpreted or applied the sections of the Employment (Amendment) Act dealing with the following issues is debatable: registering a grievance before the competent officer; registering a grievance before the Tribunal; and penalties by the Tribunal (especially compensatory awards).

1 Introduction

In 1995, the National Assembly of Seychelles passed the Employment Act.¹ Although the Employment Act has a short title, it does not include a long title. However, its purposes are discernible from its different sections and one of such purposes is to establish a mechanism in which

1 Employment Act, Chapter 69. The Act commenced on 1995-04-03.

the disputes between employers² and workers³ can be resolved. When the 1995 Act was passed, it provided that any dispute (grievance) between the employer and the worker had to be referred to the competent officer in the Ministry responsible for employment. A party not satisfied with the decision of the competent officer had the right to appeal to the Minister responsible for employment. This mechanism had its weaknesses and the National Assembly decided to amend the Employment Act and establish the Employment Tribunal. It is against this background that on 8 September 2008, the Employment (Amendment) Bill,⁴ was published in the Official Gazette.⁵ The “objects and reasons” of the Bill as stated in its memorandum were “to amend the Employment Act in order to permit the introduction and functioning of the Employment Tribunal and repeal redundant provisions”. The memorandum outlined the specific sections of the Act to be amended.⁶ The Bill was tabled in the National Assembly on 30 September 2008 and it was debated and passed the same day. It was assented to by the President on 8 October 2008 and published in the official gazette on 13 October 2008.⁷ Although the Bill made 22 amendments to the Employment Act,⁸ not all the amendments were discussed in the National Assembly. The purpose of this article is to rely on the debates in the National Assembly to illustrate how and why the legislators passed some of the provisions of the Bill. This drafting history (the debates in the National Assembly) is relied on to suggest ways in which the drafting history of the Bill could be invoked by the Tribunal, the Supreme Court and the Court of Appeal when interpreting or applying some provisions relevant to the mandate of the Tribunal.⁹ The discussion also shows that although there are a few instances in which the Supreme Court and the Court of Appeal have grappled with interpretation of some provisions of the Act relevant to the Tribunal, they have not relied on the drafting

2 S 2 of the Employment Act defines an employer to mean “a person having a worker in the employ of that person or, where that person is absent from Seychelles, the accredited representative in Seychelles of that person, and, other than in Part III, means also the manager, agent or other responsible person acting on behalf of the employer.”

3 S 2 of the Employment Act defines a worker to mean “a person of the age 15 years and above in employment in Seychelles or on a Seychelles ship or aircraft or employed in Seychelles for service in an agency of the Government or diplomatic mission of Seychelles abroad and a trainee.”

4 Employment (Amendment) Bill, Bill 11 of 2008.

5 The Bill which was published in the Official Gazette was signed by the then Attorney General (AFT Fernando) on 2008-09-04.

6 The Bill, 1 – 13.

7 See Supplement to Official Gazette, (2008-10-13) 322-332.

8 See cl. 1 – 13 of the Bill.

9 The discussion is based on the verbatim Proceedings (Hansard) of the National Assembly of 30 September 2008. I obtained Hansards from the National Assembly on 07 December 2021. Most of the Hansards were in Creole. I am grateful to Judge Samia Andre of the Supreme Court of Seychelles for ensuring that the Hansards were translated into English. All the views expressed in this article are mine. Judge Andre never read the draft of the article and I never discussed any of the issues raised in this article with her.

history of the Bill, hence handing down decisions that are not supported by this drafting history. The author argues that had the Tribunal and the courts referred to the drafting history of the Employment (Amendment) Act, they would have applied or interpreted the provisions on the following issues differently: registering a grievance before the competent officer; registering a grievance before the Tribunal; penalties by the Tribunal (especially compensatory orders). In order to put the discussion in context, I first discuss the principles of constitutional interpretation in Seychelles.

2 Principles of statutory interpretation in Seychelles

As is the case in other countries, Seychellois courts have to interpret legislation.¹⁰ Jurisprudence of the Supreme Court and the Court of Appeal shows that in exercising this mandate, they are guided by three approaches. Firstly, a court will rely on the definition in the relevant piece of legislation. In this case, it will “cut and paste” the definition provided by the legislature.¹¹ For example, the Constitution of Seychelles provides principles for its interpretation and courts have relied on these principles to interpret some constitutional provisions.¹² It is beyond the scope of this article to discuss these constitutional principles. However, it is important to remember that the Court of Appeal, the highest court in Seychelles, held that “in Seychelles the Constitution is the supreme law of the land. Hence, since a Constitution is a law the principles of constitutional interpretation are essentially the same as the principles of statutory interpretation.”¹³ The second approach is for the courts to invoke the Interpretation and General Provisions Act¹⁴ if the word is not

10 In *Financial Intelligence Unit v Cyber Space Ltd* (SCA 27(a) of 2012) [2013] SCCA 2 (2013-05-03) para 23, the Court of Appeal held that “[t]he Court can properly interpret laws – in fact that is its duty – and the interpretation of legislation consists of both the elucidation of its substantive provisions as well as its procedural provisions.”

11 *Gappy & Ors v Dhanjee* (SCA NO 16 of 2011) [2011] SCCA 18 (2011-09-02) para 24; *Jeffrey Gonthier v Paquerette Denousse* (Civil Appeal SCA 17/2016) [2018] SCCA 20 (2018-08-12) para 12; *Commissioner of Police & Another v Antonio Sullivan & Others* (Civil Appeal SCA 26/2015) [2018] SCCA 2 (2018-05-11) para 18 (the court implies that it only interprets words which are not defined in relevant legislation).

12 See Constitution of Seychelles (1993) (Schedule 2). See generally, *Popular Democratic Movement v Electoral Commission & Anor* (SCA 16 of 2011) [2011] SCCA 25 (2011-12-09); *MD v BL* (CA 26/2016 appeal from Family Tribunal Decision 141/2016) [2017] SCSC 196 (2017-03-01) para 27; *Karunakaran v AG* (SCA CL 01/2020 (Appeal from CP 18/2019)) [2021] SCCA 8 (2021-04-30); *Sayid v R* (SCA 2 of 2011) [2013] SCCA 24 (2013-12-06) paras 17 – 18; *Michel & Others v Dhanjee & Others* (SCA NO: 05 & 06 of 2012) [2012] SCCA 10 (2012-08-31); *Government of Seychelles v Jumeau & Another* (SCA CL 01/21 – SCA CL 02/2021 and SCA MA 17/2021) [2021] SCCA 68 (Arising in CP 08/2018)) [2021] SCCA 68 (2021-12-17).

13 *Sagwe v R* (SCA cr. 02/2015) [2016] SCCA 15 (2016-08-12) para 11.

14 Interpretation and General Provisions Act, Cap 33.

defined in the relevant piece of legislation.¹⁵ The third approach is for the courts to rely on principles or aids of interpretation.¹⁶ In this case, the court applies a suitable rule to interpret a statutory provision. Case law shows that the Supreme Court and the Court of Appeal have developed rich jurisprudence on the principles of statutory interpretation. In *Sagwe v R*¹⁷ the Court of Appeal laid down the principles of statutory interpretation as follows:

In interpreting the words in a statute it is always important to look at the intention of the legislature in enacting the statute. The traditional wisdom is that the search for legislative intent is normally ascertained from the words it has used. The words used may be found in the title, preamble, chapter headings, marginal notes, punctuations, definitions, etc. of a statute. In such a situation it is easy to discern the intention of the legislature because when a statute is clear and unambiguous the inquiry into legislative intent ends at that point.¹⁸

The Court added that:

However, when a statute could be interpreted in more than one fashion the legislature's intention must be inferred from sources other than the statute. In this sense, there are other "Aids" which are not contained in the statute but may be found elsewhere...[T]he other "Aids" may be as follows:- [1] Historical background; [2] Statement of objects and reasons; [3] The original bill as drafted and introduced; [4] Debates in the legislature; [5] State of things at a time a particular legislation was enacted; [6] Judicial construction; [7] Legal dictionaries; [8] Common sense.¹⁹

These principles have been invoked in different decisions.²⁰ The "golden rule of statutory interpretation" is that words should be given their

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- 15 See for example, *Houareau v Houareau* (SCA 13 of 2011) [2012] SCCA 9 (2012-08-31); *Meme v The Land Registrar and Others* (SCA 53/2018 (Appeal from CS 85/2018)) [2021] SCCA 10 (30 April 2021) paras 20-24; *Casime and Another v R* (SCA 07 & 08/2019) [2020] SCCA 16 (2020-08-21) paras 64-65; *Neddy Micock & Another v R* (Criminal Appeal SCA 14 & 15/2018) [2019] SCCA 12 (2019-05-10) para 53; *Ina Laporte & Others v The Ministry of Land Use and Housing* (Civil Appeal SCA 09/2017) [2019] SCCA 29 (2019-08-23) para 13; *Harry Dupres v The Republic* (SCA 17/2019) [2020] SCCA 26 (2020-12-18) para 8.
- 16 *Ralph Ernesta T/a R & E Building Contractor v Commissioner of Taxes of Liberty House, Victoria, Mahe4 of 2008* (4 of 2008) [2009] SCCA 1 (2009-11-08) (the Court observed that "[t]he word 'income' is not defined in the Business Tax Act, 1987 or in the Interpretation and General Provisions Act 1976 so it takes its natural and ordinary meaning") 4.
- 17 *Sagwe v R* (SCA cr. 02/2015) [2016] SCCA 15 (2016-08-12).
- 18 As above para 13.
- 19 As above para 14.
- 20 *Ramkalawan v Republic and Another* (1/2001) [2001] SCCC 1 (2001-09-24) (ordinary/natural meaning); *R v Pothin* (2 of 2007) [2007] SCSC 44 (2007-12-13) (interpreting the sentence of "imprisonment for life" under section 26 of the Penal Code, Chapter 58 (1955); *R v Vidot* (CO37/2017) [2018] SCSC 419 (2018-04-23) para 34 (interpreting the word "grievous harm" under section 219(a) of the Penal Code); *Patti v Carrie* (SCA 38 of 2011) [2013] SCCA 30 (2013-12-06) para 7 (literal interpretation).

ordinary meaning.²¹ The Court of Appeal has explained circumstances in which a purposive interpretation has to be preferred over a literal interpretation.²² In *Simeon v R*²³ the Court of Appeal held that in interpreting legislation, the court should be sensitive to the principle of separation of powers and in particular not to play the role of the legislature. It held that:

The Court cannot, while applying a particular statutory provision, stretch it to embrace cases, which it was never intended to govern. In interpreting a statute, the Court cannot fill gaps or rectify defects. Undoubtedly, if there is a defect or an omission in the words used by the legislature, the Court would not go to its aid to correct or make up the deficiency. The Court would not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court cannot aid the legislature's defective phrasing of an Act, or add or mend, and by construction, make up deficiencies which are there.²⁴

As mentioned above, a court can refer to the drafting history of a piece of legislation to ascertain the intention of the legislature. Indeed, there are instances in which Seychelles' courts have referred to the Hansard in interpreting legislation.²⁵ The Supreme Court held that the purpose of referring to the Hansard is to determine "legislative intent."²⁶ The author demonstrates how the courts' reliance on the drafting history would have helped it to interpret some provisions of the Employment Act (introduced

21 *Cinan & Another v R* (SCA 26 & 27 of 2009) [2013] SCCA 12 (2013-08-30) para 22.

22 *Eastern European Engineering Limited v Vijay Construction (Pty) Limited* (SCA 13/2015) [2018] SCCA 30 (2018-08-31) para 9, "courts ought to purposefully interpret a statutory provision where there is a clear necessity and when there is reason given the *telos* of the statute. This is to avoid a literal construction of a particular provision which would otherwise lead to a manifestly absurd or anomalous result which could not have been intended by the legislature." See also *Telcom (Sey) Ltd v Comm. of Taxes* (SRC) (SCA 19/2013) [2015] SCCA 22 (2015-08-28) paras 23-24 (interpreting tax laws).

23 *Simeon v R* (SCA 23/2009) [2010] SCCA 7 (2010-08-13).

24 As above 6. In *Public Utilities Corporation v Elisa* (20 of 2009) [2011] SCCA 8 (2011-04-29) para 47, the Court of Appeal held that "[t]he fact of the matter is, however, there are limits up to which, under the Separation of Powers, the courts could go. It cannot with by the stroke of a judicial pen repeal and replace an Act of Parliament, unless it is inconsistent with a particular provision of the Constitution. Laws passed by Parliament may be restrictively or generously interpreted to meet the justice of the case but they cannot be repealed and replaced by the Judiciary. That task lies upon the Legislature." See also *Francis Ernesta & Others v R* (Criminal Appeal SCA 07/2017) [2017] SCCA 24 (2017-08-10) para 26; *R v Esparon and Others* (SCA No: 01 of 2014) [2014] SCCA 19 (2014-08-14) para 25.

25 *Popular Democratic Movement v Electoral Commission & Anor* (SCA 16 of 2011) [2011] SCCA 25 (2011-12-09); *President Faure & Others v Amesbury & Anor* (Constitutional Appeal SCA CL 07/2018) [2019] SCCA 3 (2019-05-10) para 16 (in this case the Court states that Hansard was not available to it otherwise it would have relied on it); *Public Utilities Corporation v Elisa* (20 of 2009) [2011] SCCA 8 (2011-04-29) para 28. *Ramkalawan v Electoral Commission & Others* (SCA CP 01/2016) [2016] SCCA 17 (2016-08-12).

26 *Popular Democratic Movement v Electoral Commission & Anor* 5.

by the Employment (Amendment) Act) in a more convincing way. The author will start the question of registering a grievance before a competent officer and how the Tribunal has approached this issue.

3 Registering a grievance before the competent officer

With the introduction of the Tribunal, the Employment (Amendment) Act put in place two grievance procedures: the employer or worker has to first take the grievance to the competent officer for mediation before lodging it with the Tribunal (should mediation fail). The Bill provided that section 61 of the Act was to be amended:

In section 61 by repealing subsection (1A) and substituting therefor the following, subsections

- (1A) Where a worker or employer has registered a grievance, the competent officer shall endeavour to bring a settlement of the grievance by mediation;
- (1B) A competent officer in mediating a settlement shall draw up a mediation agreement which shall be signed by the parties and be presented to the Tribunal for endorsement as a form of judgment by consent.
- (1C) If a party breaches the mediation agreement or any part thereof, the agreement shall be enforced by the Tribunal
- (1D) If the competent officer is unsuccessful in the mediation he shall issue a certificate to the parties as evidence that mediation steps have been undergone by such parties.
- (1E) A party to a grievance has 30 days to bring the matter before the Tribunal if no agreement has been reached at mediation.

During the second reading of the Bill in the National Assembly, only one Member suggested an amendment to the above provision. He submitted that:

[In Clause 61](Capital E) there is a repetition on several occasions. Thus [it] says 'A party to a grievance has 30 days to bring the matter before the tribunal if not [sic] agreement'. It is not legal language. 'Has 30 days' "Is not legal language. I believe what they wanted to initially say is that 'shall bring the matter before the tribunal within 30 days' so I moved that 'has 30 days' be replaced by 'shall bring the matter before the tribunal within 30 days'. Thus this would repeat [sic] in several occasions and thus making the section more legal.²⁷

Thus, when section 61(1E) was enacted, subsections (1A) to (1D) were reproduced verbatim as they had appeared in the Bill and passed at the second reading of the Bill. Only section 61(1E) was amended in the light of the above submission and provides (in its current form) that "[a] party to a grievance shall bring the matter before the Tribunal within 30 days

27 Hansard of the National Assembly (2008-09-30) (Submission by Hon Bernard Georges) 21.

if no agreement has been reached at mediation.” It is thus evident that before a party approaches the Tribunal, he/she must first attempt mediation before the competent officer. In other words, mediation is a prerequisite before approaching the Tribunal. If the mediation is successful, the competent officer draws a mediation agreement which is signed by both parties and it is enforceable by the Tribunal. However, if the mediation is not successful, the competent officer issues a certificate which the parties can use as evidence that the parties have undergone the mediation process and that the process was unsuccessful.

However, practice of the Tribunal shows that there is no strict compliance with section 61(1A)-(1D). The Tribunal only registers mediation settlements where the parties have agreed that payment should be made by instalments. In other words, where an employer agrees to compensate the worker, for example, for unlawful or justified dismissal, and the money is paid by lump sum or once off, the Tribunal does not register such a mediation settlement. This explains why since its establishment; the Tribunal has registered 128 successful mediation settlements as consent judgments.²⁸ This approach, of registering only mediation settlements where parties have agreed to pay by instalment, is not what is contemplated in section 61(1B) of the Act.

Section 61(1D) provides that “[i]f the competent officer is unsuccessful in the mediation he shall issue a certificate to the parties as evidence that mediation steps have been undergone by such parties.” During the introduction of the Bill before the National Assembly, the Minister argued that:

Provisions are being done to introduce a procedure at mediation stage where all parties at the mediation receive a certificate which confirms that mediation has been done and if it is a success or not. The certificate will allow interested parties to place their grievance before the Employment Tribunal. I must say ... that all grievance should go through the mediation stage in front of competent officers before they qualify hearing before the Tribunal. In the case where Mediation is a success, an agreement will be drafted by a competent officer and will be brought before Employment Tribunal for endorsement as a judgment by consent.²⁹

Additionally, the Bill proposed to insert paragraph 4 in Schedule 1, Part II of the Act to the effect that “[a] competent officer has 28 days from the date of registration of the grievance to complete mediation.” It was argued during the second reading of the Bill that to put it in legal language, the above draft should be amended to read “shall complete

28 In cases where parties agree on a payment and a lump-sum is made immediately after mediation, such a case is not reported to the Tribunal. The Tribunal only keeps records where parties have agreed that payment should be made by instalments. Between 2009 and 2021, 128 consent agreements were reported to the Tribunal: 2009 (14); 2010 (08); 2011 (01); 2012(11); 2013 (09); 2014 (25); 2016 (02); 2017 (08); 2018 (14); 2019 (11); 2020 (07) and 2021 (07).

29 Hansard of the National Assembly (2008-09-30) 2.

mediation within 28 days” instead of it being “has 28 days to complete mediation”.³⁰

4 Registering the grievance before the Tribunal

The above discussion also shows that the drafters of the Bill made it clear under section 61(1E) that a complainant has 30 days, after the completion of the mediation process, to lodge his/her grievance before the Tribunal. In other words, the decision to provide for the 30-day deadline was made consciously. The legislators deliberately decided not to provide any exception to the 30-day period. In practice, there are cases in which the Tribunal has interpreted the 30-day deadline strictly and it has dismissed matters which were brought outside the 30-day period.³¹ The drafting history of section 61(1E) is silent on whether the 30 days include public holidays and weekends. It is also silent on whether the period starts running the day the mediation has been unsuccessful (even if the competent officer does not issue the necessary certificate on that day) or only when the competent officer has issued the certificate. The Court of Appeal held that the 30-day period starts running not necessarily on the day the mediation attempt has failed (unless the certificate is also issued on the same day) but rather on the day the certificate is issued (if it is not issued on the day the mediation attempt failed).³²

The Court of Appeal and the Supreme Court have come to different conclusions on the issue of whether there are circumstances, under section 61(1E), in which the Tribunal can extend the 30-day deadline. Put differently, does the Tribunal have the discretion to register a grievance which has been lodged outside the 30-day deadline? In *Cointy v Beau Vallon Properties*,³³ the Supreme Court held that section 61(1E) should be interpreted literally and held that “the words ‘shall bring the matter within 30 days’ in s 61(1E) is [sic] imperative in nature and restricts the right of the ... [applicant] to file an application beyond the timeframe of 30 days given and casts a mandatory duty that the application be filed within the prescribed time.”³⁴ The Court of Appeal came to a different conclusion. It held that although section 61(1E) is silent on the question of whether the Tribunal can register a grievance which has been registered after the 30-day deadline, nothing prevents it from exercising its discretion to register an application filed a few days after the 30-day

30 As above 21.

31 ET/04/12 (foreign national); ET/48/18 (after three and half months after failed mediation – citizen); ET/49/18 (four months after failed mediation – citizen).

32 *Cointy v Beau Vallon Properties* (SCA 18/2013) [2015] SCCA 19 (2015-08-28).

33 *Cointy v Beau Vallon Properties* (CA 21/2012) [2013] SCSC 143 (2013-04-15).

34 *Cointy v Beau Vallon Properties* (2013).

deadline provided the respondent will not be prejudiced by the Tribunal's decision to hear and determine such application on merits.³⁵ In the author's view, the Court of Appeal's reasoning is neither supported by the drafting history of section 61(1E), to which neither court refers, nor by the literal interpretation of the section. Put differently, both the drafting history and literal interpretation of section 61(1E) dictate that section 61(1E) should be interpreted strictly.

The drafting history above shows that the legislators made it clear that before the Tribunal registers a grievance from any of the parties, he/she is required to submit a certificate that he/she has been at mediation and that the mediation has been unsuccessful. As mentioned above, during the second reading of the Bill, the Minister argued that "[t]he certificate will allow interested parties to place their grievance before the Employment Tribunal. I must say ... that all grievance should go through the mediation stage in front of competent officers before they qualify for a hearing before the Tribunal."³⁶ Implied in the above statement is that mediation is a prerequisite before a person registers his/her grievance before the Tribunal. However, the Supreme Court and the Court of Appeal have approached this issue differently. In *Coıntı v Beau Vallon Properties*,³⁷ the Court of Appeal referred to section 61(1E) and held that:

Mediation is described as a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator assists the parties to negotiate a settlement. Under the Employment Act, mediation is the first tier of dispute resolution in labour disputes. In the event that the mediation is not successful, the certificate of mediation is the formal document that mediation has been conducted, albeit unsuccessfully. The Employment Tribunal will not entertain the dispute unless it has been dealt with by 'a competent officer' at mediation.³⁸

The Court held further that section 61 of the Act obligates a competent officer to issue a certificate which is required by any aggrieved person to lodge a grievance before the Tribunal.³⁹ It reasoned further that "[m]ediation as required by the Act must come to an end, with one result or the other. Each result can only be known by the record the competent officer presents."⁴⁰ In this decision, the Court held that parties are obligated to go for mediation before they can lodge a grievance before the Tribunal. However, almost four years later, in *Seychelles Petroleum Company Limited v Port-Louis & Anor*⁴¹ the Supreme Court arrived at a

35 *Coıntı v Beau Vallon Properties* (2013) para 27. The Supreme Court had held that the Tribunal did not have the discretion to receive a complaint which is filed after 30 days, see *Coıntı v Beau Vallon Properties* (2013) para 22.

36 Hansard of the National Assembly (2008-09-30) 2.

37 *Coıntı v Beau Vallon Properties* (CA 18/2013) [2015] SCCA 19 (2015-08-28).

38 As above paras 14-15.

39 As above para 17.

40 As above para 25.

41 *Seychelles Petroleum Company Limited v Port-Louis & Anor* (CA 44/2018) [2019] SCSC 623 (2019-07-24).

different conclusion. Schedule 6 to the Employment Tribunal, which was also included in the Act by the 2008 Employment (Amendment) Act, provides for, inter alia, the jurisdiction of the Tribunal. Paragraph 3 of Schedule 6 is to the effect that:

- (1) The Tribunal shall have exclusive jurisdiction to hear and determine employment and labour related matters.
- (2) Without prejudice to the generality of the foregoing, the Tribunal shall hear and determine matters relating to employment and labour that have not been successful at mediation if a party to the dispute instigates such matter.
- (3) The Tribunal shall not hear and determine any claim relating to damages for personal injuries,
- (4) For the purposes of this Act, a reference to the Magistrates' Court in any written law in connection with matters under subsection (1) and (2) shall be deemed to be a reference to the Tribunal.

In *Seychelles Petroleum Company Limited v Port-Louis & Anor*⁴² the Supreme Court referred to paragraph 3 above and held that:

Rule [paragraph] 3(1) is very specific in granting the Employment Tribunal exclusive jurisdiction to hear and determine employment related issues. Rule [paragraph] 3(2) provides also that the Employment Tribunal shall hear and determine matters relating to employment and labour that have not been successful at mediation if a party to the dispute instigates such matter. Mediation was not instigated in this case. Rule [paragraph] 3(2) is qualified by the phrase "if a party to the dispute instigates such matter." It does not restrict the jurisdiction of the Employment Tribunal to hear only matters that has [sic] been subject to the mediation process and it does not oblige parties to go through the mediation process. It gives the parties a choice to go for mediation and in the event of failure not to be prescribed from having the Tribunal hear their case. Rule [paragraph] 3(2) is without prejudice to rule [paragraph] 3(1), hence it only compliments but does not overrule rule [paragraph] 3(1).⁴³

In this case, the Supreme Court does not refer to section 61 of the Employment Act. It is argued that had the Supreme Court referred to section 61 of the Act and to the drafting history of section 61 and Schedule 6 to the Act, it would have arrived at a different conclusion. This is so because the drafting history, as illustrated above, shows that the legislators were unanimous that mediation was a prerequisite. In the author's view, the Court of Appeal made the correct decision although its reasoning was not based on the drafting history of section 61 of the Act.

Related to the above discussion is the meaning of an unsuccessful mediation. As mentioned above, during the making of the Employment (Amendment) Act, the legislators were emphatic that mediation had to take place before a competent officer and that the Tribunal's jurisdiction could only be triggered after the mediation had been unsuccessful. In other words, both parties must have appeared before the competent

42 As above.

43 As above para 9.

officer before he/she can issue a certificate to the effect that the mediation was not successful. It is against this background that section 61(1D) of the Act provides that “[i]f the competent officer is unsuccessful in the mediation he shall issue a certificate to the parties as evidence that mediation steps have been undergone by such parties.” Interpreting section 61(1D) strictly and in the light of its drafting leads to the conclusion that a certificate should only be issued after both parties have appeared before the competent officer and mediation failed. Practice from the Tribunal shows that competent officers have always given one of the two reasons to issue the certificate under section 61(1D) as proof that mediation was not successful: either because the parties failed to agree on a settlement⁴⁴ or that the respondents failed to appear before the mediation officer despite being served notice to appear.⁴⁵ It is argued that in case where the respondent refuses or fails to appear before the competent officer for mediation, the competent officer should not conclude that the mediation was unsuccessful. He/she should not issue a certificate. This is so because the mediation did not take place. In other words, in such a case the Tribunal should not exercise its jurisdiction. Admittedly, the Tribunal’s refusal to exercise jurisdiction in such a case will leave the aggrieved party without a remedy – the respondent would have refused to appear before the competent officer and because of this refusal, the Tribunal doesn’t have jurisdiction. As discussed below, the solution to this dilemma lies in, for example, amending the Employment Act to make it compulsory for the respondent to attend mediation.

As mentioned above, in *Coinity v Beau Vallon Properties*,⁴⁶ the Court of Appeal referred to section 61(1E) and described mediation as follows:

Mediation is described as a form of alternative dispute resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator assists the parties to negotiate a settlement. Under the Employment Act, mediation is the first tier of dispute resolution in labour disputes.⁴⁷

The challenge though is that the Employment Act is silent on the circumstances in which parties may be compelled to appear before a competent officer for mediation. This loophole would have to be addressed through an amendment to the Act or by the Minister

44 ET/85/A/11; ET/85/C/11; ET/85/B/11; ET/127/11; ET/145/11; ET/29/20; ET/32/20.

45 88/11; 102/11; ET/113/11; ET/43/21; ET/24/12; ET/26/20; ET/45/12; 71/12 (silent on how many notices issued); 72/12 (silent on how many notices issued); ET/235/12; ET/115/11; ET/18/20 (silent on how many notices issued); ET/28/20; ET/28/20 (the facts are silent on whether notice was served on the respondent to appear); ET/20/21.

46 *Coinity v Beau Vallon Properties* (2015).

47 As above para 14.

responsible for employment through making the necessary regulations.⁴⁸ The Act could also be amended to provide that the Tribunal has jurisdiction should one of the parties fail to go for mediation. However, in such a case, failure to go for mediation, without a reasonable excuse, should attract heavy fines/costs or should be criminalised. This approach has been followed in some African countries such as Uganda⁴⁹ and Mozambique.⁵⁰ Otherwise the mediation step is likely to be rendered redundant.

5 Penalties by the Tribunal

The Hansard shows how the legislators dealt with the issue of penalties within the jurisdiction of the Tribunal. The paragraph 7 of Schedule 6 to the Bill (2008) provided that:

At the conclusion of the proceedings the Tribunal may, in addition to any other remedies provided under this Act, order imprisonment or payment of a fine, award compensation or costs or make any other order as it thinks fit.

It is evident that on the issue of imprisonment and fines, the Bill did not stipulate the maximum number of years and amount respectively. During the second reading of the Bill, the Minister submitted that:

Apart from having power to these sort of remedies [power to issue summons, examine witnesses or ask anyone to produce any document before the Tribunal] to make employer pay benefits for the employee, it will also be able to make orders of imprisonment, make orders to pay fines, and other orders

48 S 76(i) of the Act empowers the Minister responsible for employment to make regulations “generally, for the better carrying into effect the purposes and provisions of this Act.” Para 10 of Schedule 6 to the Act provides that “[t]he Minister may make regulations- (a) for the better carrying out of the purposes of the Tribunal; (b) regulating the procedure of the Tribunal; (c) prescribing allowances for witnesses, application fees and any other fees in connection with services given by the Tribunal; (d) prescribing forms to be used by the Tribunal.” For a discussion of the constitutional powers of the Minister to make regulations in terms of legislation in Seychelles, see *Geers v Government of Seychelles & Others* (CP 1/2018) [2019] SCCC 3 (2019-05-31).

49 Rule 14 of the Judicature (Mediation) Rules, 2013 (Statutory Instrument 10 of 2013) (Uganda) provides that “(1) Where it is not practicable to conduct a scheduled mediation session because a party fails to attend, the mediator may adjourn the mediation session to another date. (2) Where a party, without good cause, fails to attend a mediation session that party shall pay five currency points to the other party as adjournment costs. (3) A certificate of the mediator setting out the adjournment costs, in these Rules referred to as the Certificate of Non Attendance, shall be taken to be an order of the court and shall not be subject to appeal except as part of a general appeal at the conclusion of the civil action.”

50 Article 187(4) of the Labour Law (Law Nr. 23/2007 of 2007-08-01) provides that “[i]f the party that requested the mediation fails to appear on the day of the mediation hearing without justification, the mediator shall shelve the case, whereas if the other party fails to appear the mediator shall, of his own motion, refer the case to arbitration. In either case, the defaulting party shall have to pay a fine set by the mediation and arbitration centre.”

which are appropriate ... The Employment Tribunal shall have the same power as a Magistrate Court. Provisions will also be made in the bill where a party who does not respect the order of the Employment Tribunal without a valid reason can be convicted to 2 years imprisonment or ordered to pay a fine of up to Rs 40,000 if found guilty.⁵¹

In this submission, the intention of the legislators was to provide for two situations. Firstly, where the Tribunal convicts a person of an employment offence under section 76 and secondly, where the Tribunal convicts a person for disobeying its order. In the case of the first situation, the draft Bill did not provide for the maximum number of years that the Tribunal would have imposed. However, in the case of the second situation, the maximum number of years was provided. In response to this loophole, one legislator made the following submission on draft paragraph 7 above:

[I] would like to make a submission on] schedule 6 paragraph 7, where tribunal has the right to give various remedies. We are also giving them the right to imprisonment, payment of fine, compensation and cost, etc., this also is normal. It's totally appropriate that a tribunal has an inventory at measures, but the way we've drafted paragraph 7, we are giving them in addition to other remedies under this act which Employment Act has the rights to convict to imprisonment, fine for specific offences, we are giving them a blanket right and I do not believe that we can do this. I do not believe that we can give a tribunal a blanket right to impose custodial sentence which they see fit like we are doing now, fine or compensate or cost which they find appropriate. All of this should be limited by a law and the Employment is the law to limit this. It says under such offence, someone can be convicted to imprisonment for so many year [sic] or a fine, but we are giving them a blanket jurisdiction that allows it to go as far as the Supreme Court, because in addition to other remedies under this act or the imprisonment. It's possible that this tribunal orders imprisonment harsher than the Magistrate Court, like for example it may be ordered. We have to limit this ...⁵²

Another legislator argued that:

the fact that the tribunal will have a lot of power, such power of imprisonment, impose fines, order payment, compensation and other benefits, and that fact that anyone who refuse to follow the tribunals order will be committing an offence whereby they would be able to be convicted up to 2 years or pay a fine of Rs 40,000 will make that industrial relations in this country will take a new dimension.⁵³

Another legislator asked:

[T]he Minister in her summing up to clarify certain points for us. This is in regard to schedule 6, paragraph 7 like honourable Georges has brought up with regard to powers vested in the tribunal to impose, order, imprisonment or fine for payment, award compensation for cost, but it does not have a maximum on which it is permitted/allowed to do so. In the same schedule 6

51 Hansard of the National Assembly (2008-09-30) 2-3.

52 As above 10-11 (submissions by Hon Bernard Georges).

53 As above 14 (submission Hon Bernard Adonis).

in paragraph 9, under we see for example that it is said that a cap is placed where “is guilty of an offence and is liable a conviction to imprisonment for a term not exceeding 2 years or a fine not more than 40 thousand. Like there is a maximum which imposes control but on the [other] hand we do not see control.”⁵⁴

In response to these submissions, the Minister responded that:

We thought with the introduction of tribunal we could perhaps make provisions for other compensatory award that the tribunal may see fit to consider with regards to people who has [have] suffered loss of earning, loss of incentives in the case someone has lost their job, the tribunal could go a little bit further that [than] is provided/provisioned under the employment law[.] [B]ut I understand that the tribunal does not necessarily need the power to imprisonment or payment of fine but I would ask that we re-think with regards to compensation and after consideration that a competent officer might not have the right to do, but as a tribunal could consider based on the case before them.⁵⁵

Against that background, one legislator submitted that “I would suggest that we delete ‘order imprisonment or payment of fine’ and we keep ‘a compensation or cost and makes ...’”⁵⁶ In the light of the above submission, all the legislators agreed that the words “imprisonment or payment of fine” should be deleted.⁵⁷ They were deleted and the final version of the amendment, which was included in the Act, provides that “[a]t the conclusion of the proceedings the Tribunal shall in addition to any other remedies provided under this Act, award compensation or costs or make any other order as it thinks fit.”

A few observations should be made about the above drafting history of paragraph 7 of Schedule 6 to the Act. Firstly, although the Tribunal has criminal jurisdiction under section 76 of the Act,⁵⁸ it does not have jurisdiction to impose a custodial sentence on a person it has convicted of an offence. Secondly and related to the above, although the Tribunal does not have power under paragraph 7 to impose fines on people it has convicted of offences, it derives those powers from other sections of the Act or regulations enacted in terms of the Act.⁵⁹ This explains why in all cases in which the Tribunal has convicted employers under section 76 of

54 As above 17-18 (submission by Hon Gervais Henrie).

55 As above 20 (submission by Minister Macsuzy Mondon).

56 As above 25 (submission by Hon Bernard Georges).

57 As above 26-27.

58 S 76 provides for different offences by employers and employees.

59 See for example, ss 77(1) and (2) of the Act; regs 26 and 50 of the Employment (Conditions of Employment) Regulations (1991-05-01)(SI. 34 of 1991); reg 5 of the Employment (National Minimum Wage) Regulations (2007-12-31)(SI. 55 of 2007); reg 5 of the Employment (Wage Increase) Regulations [2010-07-07](SI. 46 of 2010); reg 37 of the Employment (Conditions of Employment of Domestic Workers) Regulations (SI. 37 of 2019).

the Act, it has imposed fines on them.⁶⁰ Thirdly, there is no doubt that the intention of the legislators was to confer both civil and criminal jurisdiction on the Tribunal. Therefore, had the Tribunal considered the drafting history of the Employment (Amendment) Act (2008), it would not have concluded that it lacked criminal jurisdiction. It should be recalled that in September 2017, the Tribunal held that it had no criminal jurisdiction⁶¹ and against that background, it dismissed subsequent cases in which parties asked it to exercise criminal jurisdiction.⁶² Fortunately, in *Republic at the Instance of MLHRD v Employment Tribunal and Port Glaud Resort Pty Ltd*,⁶³ the Supreme Court, by adopting a literal interpretation of the Employment Act, held that the Tribunal's reasoning that it had no jurisdiction in criminal matters was contrary to the Employment Act. Lastly, the Tribunal has the power to order an employer to pay compensatory awards.

As mentioned above, Rule 7 of Schedule 6 to the Act provides that “[a]t the conclusion of the proceedings the Tribunal shall in addition to any other remedies provided under this Act, award compensation or costs or make any other order as it thinks fit.” There are a few cases in which the Tribunal has dealt with the issue of compensatory awards. It held that compensatory awards are “entirely at the discretion” of the Tribunal.⁶⁴ The Supreme Court held that the Tribunal's discretion under Rule 7 is “broad.”⁶⁵ However, “an award should be just, fair and equitable as against both the respondent, and the appellant.”⁶⁶ The applicant has to lay the “basis” for the compensatory award otherwise the claim will be dismissed.⁶⁷ The compensatory awards the Tribunal has made against

60 No.2 of 2020 (failing to submit proof that the company was paying employees its salaries, the employees had alleged that they were not being paid); No. 8 of 2020 (juristic person convicted under section 76(1)(a)); No.4 of 2020 (employer convicted); ET/C/4/14 of 2014 (natural person, trading as a company, pleaded guilty and convicted); ET/C/26 of 2014 (businessman convicted of failing to submit an establishment list); ET/C/02/21; ET/C/03/21; ET/C/04/21 and ET/C/12/21; ET/C/5 of 2010 (natural person convicted – pleaded guilty); ET/C/46 of 2009 (natural person failing to pay salary of employee); ET/C/23 of 2009 (limited liability company prosecuted for failing to pay one of its employees his legal employment benefit).

61 ET/C/02/17 of 2017.

62 See for example, ET/C/04/16; ET/C/06/16; ET/C/04/17 of 2017; ET/C/05/17 of 2017.

63 *Republic at the Instance of MLHRD v Employment Tribunal and Port Glaud Resort Pty Ltd* [2018] SCSC 881.

64 ET/109/19 para 20.

65 *Soundy v Vertex Management Ltd* (Civil Appeal No. 62/2012) [2013] SCSC 48 (2013-05-31) para 57.

66 *Guichard v Matombe* (CA 27/2017) [2018] SCSC 910 (2018-10-11) para 21.

67 ET/136/18 para 10 (the claim for three months compensatory award was dismissed as the applicant had terminated his employment).

employers have included one month's salary,⁶⁸ two months' salary⁶⁹ and three months' salary.⁷⁰ In some cases the Tribunal has not made compensatory awards although the applicants asked for the same and the Tribunal found that the dismissal was unlawful.⁷¹ The Tribunal will sometimes dismiss an application for compensatory award without giving reasons.⁷² The Tribunal will also decline to make a compensatory award if the employee's conduct was prejudicial to the employer's business.⁷³

Although the Tribunal has dealt with thousands of cases since its establishment (between 3rd December 2018⁷⁴ and 1st December 2021,⁷⁵ the Tribunal had received 2,478 civil cases⁷⁶ and 172 criminal cases),⁷⁷ there are very few instances in which it has invoked its discretion to make compensatory awards. In most of the cases where the Tribunal has found that the employers unlawfully or unfairly terminated their workers' contracts of employment, it has ordered them to pay the outstanding legal benefits and one-month salary as compensation in lieu of notice.⁷⁸ For example, the Tribunal has ordered the employers to pay the unpaid salaries;⁷⁹ repay unauthorized deductions,⁸⁰ pay the applicant and his family repatriation fares, leave earned and public holidays;⁸¹ pay overtime;⁸² or pay annual leave.⁸³

This approach could have encouraged some employers to dismiss their workers unlawfully or unfairly because they know that the consequences are bearable. The drafting history of the Employment (Amendment) Act (2008) shows that the legislators expected the Tribunal

68 ET/131/18; ET/18/18 (based on the respondents' offer to the workers – unfair dismissal conceded by the employers); ET/21/15 (consent judgement); ET/125/16 (the employer, who was on probation, had his contract of employment terminated before the employer could give him an opportunity to work on his weaknesses).

69 ET/116/16 (consent judgement).

70 ET/61/15 (the employer had not been given an opportunity to explain himself before his contract of employment was terminated by the employer).

71 ET/188/18; ET/58/18 (dismissal unjustified).

72 ET/11/18.

73 ET/17/16.

74 When the Tribunal registered its first complaint.

75 When the author read through the Master Files of the Tribunal.

76 The number of cases registered each year is indicated in the brackets: 2008 (8); 2009 (234); 2010 (331); 2011 (173); 2012 (242); 2013 (229); 2014 (206); 2015 (157); 2016 (134); 2017 (230); 2018 (249); 2019 (114); 2020 (98) and 2021 (73).

77 The number of cases registered each year is indicated in the brackets: 2008 (0); 2009 (48); 2010 (19); 2011 (04); 2012 (11); 2013 (17); 2014 (27); 2015 (09); 2016 (07); 2017 (07); 2018 (0); 2019 (07); 2020 (08) and 2021 (08).

78 See for example, ET/148/12; ET/51/15.

79 ET/146/11; ET/34/12.

80 ET/43/20.

81 ET/04/12.

82 ET/33/19.

83 ET/5/21.

to make compensatory awards in cases where people have “suffered loss of earning, loss of incentives in the case someone has lost their job.”⁸⁴ It is argued that in order to better protect the rights of workers and to deter employers from terminating contracts of employment unlawfully or unfairly, the Tribunal will, as a general rule, have to make compensatory awards. In other words, in cases where it concludes that the termination was unfair or unlawful and reinstatement is not possible, it should make compensatory awards. The burden should be on the employer to motivate why an order for compensatory award should not be made.

6 Conclusion

In this article, the author has discussed the drafting history of the Employment (Amendment) Act of 2008. He has relied on the Hansard of the Seychelles National Assembly on the Employment (Amendment) Act to argue that had the Tribunal, the Supreme Court and the Court of Appeal put this Hansard into consideration, they would have interpreted or applied the provisions of the Employment Act as amended by the Employment (Amendment) Act 2008 relating to the following issues differently: registering a grievance before the competent officer; registering a grievance before the Tribunal; and penalties by the Tribunal (especially compensatory awards).

84 Hansard of the National Assembly (2008-09-30) 20.