

Migrant Workers in Seychelles: The Mechanisms in Place to Address Their Work-Related Disputes in the Light of Article 54(2) of the Convention on Migrant Workers

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Abstract

According to the Seychelles Ministry of Employment, as of July 2022, twenty-five per cent of the workforce in Seychelles were migrant workers. In December 1994, Seychelles acceded to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (the Convention). Article 54(2) of the Convention provides that ‘[i]f a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment.’ In 2008, the Seychelles Employment Act (the Act) was amended to establish the Employment Tribunal (the Tribunal) with exclusive jurisdiction over labour matters. Before an employer or worker lodges a grievance before the Tribunal, he/she is required to first attempt mediation before a competent officer in the Ministry of Employment. The Act includes specific provisions applicable to non-Seychellois workers. In this article, the author read the cases decided by the Tribunal between 2008 and September 2022 to establish how it has protected the rights of migrant workers. The author also assesses the mediation provisions under the Act—before competent officers. The findings show that the Tribunal’s approach substantially complies with Article 54(2) of the Convention. The author also illustrates the extent to which Seychelles complies with Articles 1(2), 25, 26, 32, 37, 43(3) 66(2) and 68 of the Convention. However, where necessary, the author suggests ways in which the rights of migrant workers can be better protected. Although there have been a few reported cases of irregular foreign workers in Seychelles, this article is limited to the protection of the rights of regular migrant workers. This is so because the

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author could not find a case in which the Tribunal or the competent officer dealt with the rights of irregular foreign workers. However, based on the drafting history of the Convention, it is argued that it applies to both regular and irregular workers.

Keywords: Seychelles; migrant workers; Article 54(2); Convention on Migrant Workers; Employment Tribunal; competent officer; irregular migrant

Introduction

According to the Seychelles Ministry of Employment, as of July 2022, twenty-five per cent of the workforce in Seychelles were migrant workers.¹ These migrant workers are needed to address ‘the short-term to medium-term skills shortfall’ that Seychelles is experiencing.² Although many possess specialised skills that are on high demand in Seychelles,³ some are unskilled.⁴ Seychelles acceded to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Convention) in December 1994.⁵ This Convention provides for many rights most of which are also included in the Constitution of Seychelles and applicable to both Seychellois and migrant workers. It is inevitable that disputes between employers and workers, whether nationals or foreigners, will always arise. It is therefore necessary that measures are put in place to address such disputes. Thus, Article 54(2) of the Convention provides that ‘[i]f a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment, on terms provided for in article 18, paragraph 1, of the present Convention.’ On the other hand, Article 18(1) provides that:

Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they

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- 1 Vidya Gappy and Syla Ah-Time, ‘Labour Migration Management in the Spotlight’ (*Seychelles Nation*, 5 July 2022) <<https://www.nation.sc/articles/14176/labour-migration-management-in-the-spotlight>> accessed 22 September 2022.
 - 2 Uma Kothari and Rorden Wilkinson, ‘Global Change, Small Island State Response: Restructuring and the Perpetuation of Uncertainty in Mauritius and Seychelles’ (2013) 25(1) *Journal of International Development* 92–107, 104.
 - 3 Haroon Bhorat, Arabo Ewinyu and Derek Yu, ‘The Seychelles Labour Market’ (*Africa Portal*, 28 July 2017) <<https://www.africaportal.org/publications/seychelles-labor-market/>> accessed 27 April 2023 25.
 - 4 Mark P Hampton, Julia Jayachaya and Donna Lee, ‘The Political Economy of Precarious Work in the Tourism Industry in Small Island Developing States’ (*Kent Business School*, January 2014) Working Paper No. 281 <<https://core.ac.uk/download/pdf/30706956.pdf>> accessed 27 April 2023.
 - 5 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003).

shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Although Seychelles has not yet domesticated the Convention,⁶ international law requires it to perform the obligations imposed by the treaty in good faith.⁷ Although the Convention mentions irregular migrant workers in some of its provisions,⁸ it is beyond the scope of this article to discuss the protection of the rights of irregular migrant workers in Seychelles. This is so because I did not come across any case in which the Tribunal was seized with a matter involving irregular migrant workers. However, there are a few cases in which employers have been convicted of human trafficking where the evidence showed that they trafficked foreign nationals into Seychelles and exploited their labour.⁹ This implies that there are irregular migrant workers in Seychelles, however few. It is therefore important to briefly deal with the question of whether the Convention is applicable to irregular migrant workers. This issue is dealt with towards the end of this article, and it illustrates that the measures in the Act are applicable to both regular and irregular migrant workers—should the Tribunal or competent officer be confronted with a case of an irregular migrant worker claiming a violation of their terms of employment.

In 2008, Seychelles established the Employment Tribunal (the Tribunal). The Tribunal has ‘exclusive jurisdiction to hear and determine employment and labour related matters.’¹⁰ Since its establishment, the Tribunal has decided 2639 civil and 156 criminal matters and registered 133 judgments by consent.¹¹ Some of these civil and criminal matters and judgments by consent deal with the rights and obligations of migrant workers. The Employment Act (the Act)¹² provides for two procedures which may be followed by Seychellois and non-Seychellois workers in the event of any dispute between them and their employers. The first procedure is to resolve the matter through mediation before a competent officer. If mediation is successful, the mediation agreement between the employer and the worker becomes a judgment by consent which

6 Seychelles follows a dualist approach to international law. See Article 64(4) of the Constitution and *Roble and Others v R* [2015] SCCA 24.

7 Article 26 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980).

8 On irregular migrant workers, see Articles 5, 25(3) and 35.

9 *R v Alam* [2018] SCSC 946; *Republic v Chand* [2021] SCSC 713; *R v Leon and Anor* [2021] SCSC 201; *R v Labrosse* [2021] SCSC 44.

10 Rule 3 of Schedule 6 to the Act.

11 Statistics the author obtained from the Tribunal in August 2022. The Tribunal’s files are not available online and its decisions are not reported. The author visited Seychelles between 14 August and 11 September 2022 to conduct research at the Tribunal. He was granted access to the files on condition that he keeps the parties’ names confidential in any publication. This article is written based on the files accessed during this research visit. Due to a confidentiality agreement between him and the Tribunal, he is not at liberty to disclose the names of the parties to the cases and hence the case numbers are used instead.

12 (1995) ch 69.

is enforceable by the Tribunal.¹³ If mediation is not successful, the competent officer issues a certificate to that effect which the complainant presents to the Tribunal to register a grievance.¹⁴

Practice from the Tribunal shows that non-Seychellois workers who have registered their grievances have included Indians,¹⁵ Americans,¹⁶ French,¹⁷ Mauritians,¹⁸ Germans,¹⁹ Nepalese,²⁰ Philippines,²¹ Chinese,²² Bangladeshi,²³ Russians,²⁴ Madagascans,²⁵ Sri Lankans,²⁶ Kenyans²⁷ and Ugandans.²⁸ They have been working in different sectors such as construction,²⁹ entertainment,³⁰ hospitality,³¹ education,³² information technology³³ and as domestic workers.³⁴ The employers include sole traders,³⁵ limited liability companies³⁶ and private individuals.³⁷ In most of the cases, it is workers who have registered grievances with the competent officers or the Tribunal because they allege that the employers have breached the contracts of employment. These breaches have included, failure to pay salaries,³⁸ unlawful termination of employment,³⁹ working for longer hours contrary to the contract,⁴⁰ unlawful adjustment

13 *ibid* s61(1A) and (1B).

14 *ibid* s61(1C).

15 ET/06/08; ET/102/10; ET/295/10; ET/14/14; ET/15/14–ET/20/14 (consolidated cases against the same employer).

16 ET/82/09.

17 ET/18/10; ET/210/12.

18 ET/282/10.

19 ET/33/12.

20 ET/80/12–ET/87/12 (all cases combined).

21 ET/115/12–ET/120/12 (combined cases); ET/39/14; ET/127/15.

22 ET/C/07/13.

23 ET/183/12.

24 ET/69/16.

25 ET/79/16.

26 ET/233/18; ET/149/15.

27 ET/56/19.

28 ET/99/19–ET/106/19.

29 ET/06/08; ET/102/10; ET/33/12; ET/115/12–ET/120/12 (combined cases); ET/70/13; ET/103/13; ET/155/13; ET/184/13; ET/15/14–ET/20/14 (consolidated cases against the same employer); ET/32/14; ET/183/12.

30 ET/82/09 (casino).

31 ET/282/10; ET/80/12–ET/87/12; ET/109/15; ET/149/15 (hotel); ET/210/12 (diver).

32 ET/295/10 (lecturer at an institute).

33 ET/14/14.

34 ET/39/14; ET/127/15 (nanny/carer).

35 ET/02/14; ET/50/15.

36 ET/14/14; ET/32/14.

37 ET/39/14 (nanny/carer).

38 ET/70/13; ET/79/16; ET/14/14; ET/02/14; ET/14/14; ET/15/14–ET/20/14; ET/32/14; ET/39/14; ET/32/14

39 ET/06/08; ET/07/08; ET/82/09; ET/18/10; ET/80/12–ET/87/12 (in this case the employer terminated the employment because the workers' performance was unsatisfactory); ET/295/10.

40 ET/127/15.

of salary,⁴¹ and unpaid food and housing allowances.⁴² In some cases, the employer terminated employment because workers were participating in an ‘illegal strike’ and did not work for three days.⁴³ Sometimes the file does not disclose the grievance but only states that the applicant wants their terminal benefits. However, one can infer that the contract was terminated by the employer.⁴⁴ There have been instances in which employers have registered grievances against workers on grounds including failure to give notice before terminating employment⁴⁵ and reimbursement of salaries⁴⁶ or other relevant expenses incurred on them such as meal allowance,⁴⁷ mobile telephone⁴⁸ or training expenses.⁴⁹ They have also included repayment of the outstanding balance of a loan⁵⁰ and the return of company property.⁵¹ The Tribunal will find an employer in breach of contract of employment even if the contract with the non-Seychellois worker was unwritten.⁵² In this article, I highlight the two procedures in the Act to the extent that they are applicable to non-Seychellois workers. In the process, I also highlight the extent to which Seychelles has complied with other provisions of the Convention such as Articles 1(2), 25, 26, 32, 37, 43(3) 66(2) and 68. In order to put the discussion in context, I first discuss the right to work in Seychelles generally and the law governing the conditions of employment of non-Seychellois workers. Thereafter, I discuss the grievance procedures in place.

The Right to Work in Seychelles

Article 35 of the Constitution provides that every citizen has a right to work and to just and favourable conditions of work. It also imposes different obligations on the State to ensure that this right is realised. Unlike other rights in the Constitution which can be enjoyed by every person,⁵³ the right to work is for citizens only. In *Faure v Prea and Another*⁵⁴ the Constitutional Court referred to Article 35 of the Constitution and held that the right to work has its origin in Articles 6 and 7 of the International Covenant on

41 ET/102/10 (the contract was signed abroad (in India)).

42 ET/103/13.

43 ET/06/08; ET/07/08.

44 ET/115/12–ET/120/12 (combined cases).

45 ET/142/11; et/152/11; ET/153/11; ET/27/12.

46 ET/31/12; ET/98/12; ET/188/13; ET/201/14; ET/39/15; ET/71/15; ET/31/14.

47 ET/144/12; ET/145/12.

48 ET/162/12 (payment made in full).

49 ET/111/14.

50 ET/125/12 (the respondent paid).

51 ET/41/13; ET/67/14 (pair of shoes of a private security company); ET/82/13 (return hotel belongings).

52 ET/295/10 (the Tribunal found that the termination of employment was unjustified). Section 18(2) of the Act provides that a contract of employment between an employer and a non-Seychellois worker has to be in writing.

53 For example, freedom of movement (Article 25(1)); freedom of assembly and association (Article 23) and freedom of expression (Article 22).

54 [2019] SCCC 11.

Economic, Social and Cultural Rights.⁵⁵ The right to work is also dependent on the protection of other relevant rights such as the right to access information.⁵⁶ Apart from the right to work, the Constitution also recognises the right of working mothers. Thus, Article 30:

The State recognises the unique status and natural maternal functions of women in society and undertakes as a result to take appropriate measures to ensure that a working mother is afforded special protection with regard to paid leave and her conditions at work during such reasonable period as provided by law before and after childbirth.

Unlike the right to work under Article 35, the rights of working mothers are applicable to all mothers irrespective of nationality. Article 30 is only applicable to working mothers. It does not protect female employees generally.⁵⁷ In 2008, the Constitution Review Committee proposed that Article 30 should be amended so that ‘after the words “ensure that” the following be inserted “mothers are afforded protection necessary for their welfare and the welfare of the child and that”.’⁵⁸ The Committee argued that ‘[t]he purpose of this amendment is to recognize that all women as mothers, and not just mothers who are employed or engaged in a job, need protection in order to ensure and guarantee the survival of the nation and its future.’⁵⁹ However, this amendment was rejected. This confirms the view that Article 30 is applicable only to ‘mothers who are employed or engaged in a job.’ The Constitution provides for the circumstances in which children may be employed.⁶⁰ It also requires the State to provide social security for the citizens who are unable to work.⁶¹ One of the ‘fundament duties’ of a citizen is ‘to work conscientiously in a chosen profession, occupation or trade.’⁶² However, much as the right to work is reserved to citizens, Seychelles law provides for circumstances in which migrant workers may work. The discussion below deals with the measures the Seychelles government has put in place to protect the rights of migrant workers in the workplace.

55 *ibid* para 141.

56 *Intershore Banking Corporation LTD v Central Bank of Seychelles* [2018] SCCA 4 para 42.

57 *Mahoune v Attorney-General* [2007] SCSC 133.

58 Report of the Constitutional Review Committee (21 December 2009) 20. <https://www.statehouse.gov.sc/uploads/downloads/filepath_1.pdf> accessed 13 June 2023.

59 *ibid* 20.

60 Article 31.

61 Article 37.

62 Article 40 of the Constitution.

Employment of Non-Seychellois Workers

Although the government has put in place several policies to restrict the number of foreign nationals working in Seychelles,⁶³ section 18 of the Act provides for conditions which have to be met before an employer employs a non-Seychellois:

(1) Subject to the Immigration Decree an employer in Seychelles shall not employ a non-Seychellois unless-

(a) the employer holds a certificate from the competent officer to the effect-(i) that the vacant post for which the non-Seychellois is required has been advertised under section 9(4) or 11 and; (ii) that-[A] the post requires the qualification demanded for it and no Seychellois holding the qualification is, at present, available for employment in that post, or [B] the Minister is satisfied that there is no unemployed Seychellois available for employment in the vacant post;

(b) the employer has, together with the application for a certificate under paragraph (a) submitted in respect of the employer's establishment, a detailed manpower plan setting out a training and localization programme.

(2) An employer who employs a non-Seychellois worker shall ensure-(a) that the contract of employment of the worker which shall be a fixed-term contract is attested by a competent officer; (b) that the worker ceases to be in the employment of the employer upon the expiration of the unless the contract is, subject to subsection (1), extended or renewed; contract of employment.

A non-Seychellois can only be employed in exceptional circumstances and on a fixed-term contract.⁶⁴ Such a contract cannot be less than three months.⁶⁵ Once employed, he/she enjoys all the rights provided for under the Act unless the Act provides otherwise.⁶⁶

There are some benefits which are exclusive to citizens. For example, section 46C of the Act obliges every employer to pay 'to his, her or its workers a thirteenth-month pay in addition to their due salary.'⁶⁷ However, section 46C(8)(a) provides that non-Seychellois workers 'shall not be eligible to receive a thirteenth-month pay.' This approach is contrary to Article 25 of the Convention which provides for the principle of

63 See for example, Paul Thompson, Henry Wissink and Zintle Siwisa, 'The "Seychelloisation" of the Seychelles Labour Market: Policy and Constraints of Island Labour Market Reform' (2019) 14(2) *Island Studies Journal* 81–96.

64 Section 2 of the Act defines a 'fixed-term contract' to mean 'consecutive employment for a fixed term.'

65 Section 19(2) of the Act.

66 Section 67. In *Seychelles Postal Services v Nourrice and Nourrice v Seychelles Postal Services* [2021] SCSC 902 para 17, the Supreme Court held that '[t]he Legislature has seen it fit to treat Seychellois and foreign workers differently for various reasons.'

67 Section 46C(2).

equality between migrant workers and nationals in respect of remuneration. Before laying off a Seychellois worker, the employer has to make sure that he/she is not ‘employing a non-Seychellois worker in a similar post as the Seychellois worker.’⁶⁸

Before the employer or worker terminates a contract of employment, he/she must give notice to the worker or employer respectively either as stipulated in the contract or one month’s notice if the period is not stipulated in the contract.⁶⁹ This takes us to the circumstances in which a contract of employment may be terminated.

Terminating Contracts of Employment

The Act provides for two broad circumstances in which a contract of employment may be terminated and different grievance procedures are applicable depending on the circumstances in which the contract was terminated: (1) cases where termination cannot take place before negotiation and (2) cases where negotiation is not a prerequisite for termination.⁷⁰ However, for the purposes of this article, the discussion is limited to the situation where negotiation is a prerequisite before the contract of employment can be terminated. This is so because, as discussed below, there are many cases where employers of foreign nationals have breached this provision. Section 57(1) provides that ‘[a]n employer may terminate a contract of employment with notice upon a determination by the competent officer following the negotiation procedure initiated under Part VI that the contract may be terminated.’ Section 57 should be read with Part VI of the Act which provides for issues such as prevention of discrimination, prohibition of harassment, restriction on termination of contracts—negotiation procedure—and restriction on lay-off and redundancy of a Seychellois worker. Section 47 provides for the negotiation procedure:

- (1) [A]n employer shall not terminate or give notice of termination of a worker’s contract of employment except under section 49 or 50 unless the employer first initiates and complies with the negotiation procedure.
- (2) Where, consequent upon the negotiation procedure initiated under subsection (1), the competent officer determines that-(a) a contract of employment should not be terminated, the contract shall continue to have effect; (b) a contract of employment may be terminated and the cause of the termination is in no way attributable to the worker, the employer shall pay to the worker compensation ...; (c) a contract of

68 Section 51A.

69 Sections 59(d) (employer terminating contract) 60(d) (worker terminating contract).

70 The latter cases are provided for under sections 49 (if the worker does not consent to the variation of his/her terms and conditions of employment), section 50 (employer transfers his/her business to another person) and section 57(2) of the Act. The grounds on which a contract can be terminated under section 57(2) include where the worker: fails to complete his/her probationary period or training satisfactorily; is a casual, part-time or domestic worker or has committed a serious disciplinary offence.

employment may be terminated and the cause of the termination is partly or wholly attributable to the worker, the employer shall pay to the worker a lesser rate of compensation than at paragraph (b) or none, as the competent officer may assess.

A combined reading of sections 57 and 47 shows that in all circumstances, except under sections 49 or 50—and section 57(2)—a contract of employment cannot be terminated without the employer initiating a negotiation procedure. Where a negotiation procedure is initiated, the decision of whether or not the contract should be terminated lies with the competent officer. Under section 76(4) ‘[a] person upon whom there lies an obligation under Part VI to initiate the negotiation procedure and who fails to do so is guilty of an offence.’ There are cases in which employers have been convicted by the Tribunal for failing to initiate negotiation procedures.⁷¹ Section 76(5) provides that ‘[a] person who, having initiated the negotiation procedure under Part VI, fails or refuses to comply with or is in breach of any condition of any determination of the competent officer consequent upon the negotiation procedure is guilty of an offence.’ There are cases in which employers have been prosecuted under section 76(5).⁷² For example, in one case, a company which employed several foreign nationals were prosecuted for failing to ‘submit a breakdown and proof of payment’ of its workers’ legal benefits consequent upon the negotiation procedure.⁷³

Although the Act provides for a procedure through which a contract of employment may be terminated, some employers and workers do not follow it. As a result, many of the grievances before the Tribunal relate to the employer’s failure to pay salaries⁷⁴ and unjustified termination of the contracts of employment.⁷⁵ These violations prompt workers to initiate grievance procedures. It is to this issue that we turn.

Initiating a Grievance Procedure Upon Termination of Contract of Employment

The Act provides for circumstances in which an employer or worker can terminate his/her worker’s employment. The termination could be justified or unjustified. The Act provides for two types of grievance procedures: (1) the grievance procedure administered by a competent officer—a person aggrieved by the decision of the competent officer can appeal to the Minister; and (2) the grievance procedure administered by the Tribunal—a person aggrieved by the decision of the Tribunal can appeal to the Supreme Court. However, under section 61, a competent officer also has

71 ET/C/24/14; ET/C/01/15; ET/C/07/12; ET/C/2/11; ET/C/1/11; ET/C/06/12; ET/C/24/13.

72 ET/C/11/13 (An employer prosecuted for failing to pay legal benefits. However, the case was withdrawn when payment was made); ET/C/17/14 (The accused pleaded guilty and was convicted and paid a fine).

73 ET/C/15/14 (However, the case was withdrawn after payment was made). The company employed 37 workers of whom seven were non-Seychellois.

74 As illustrated in this article.

75 ET/211/13 (statutory notice not given); ET/184/13 (verbal dismissal).

a role to play in the second type of grievance procedure. The discussion will start with the grievance procedure administered by the competent officer.

Grievance Procedure Before a Competent Officer

Section 61 should be read with Part IIA of Schedule 1 to the Act which provides for the procedure that a non-Seychellois worker has to follow in registering a grievance.⁷⁶ It provides that:

- An employer who terminates a contract of employment of a non-Seychellois worker who has committed a serious disciplinary offence shall notify the Chief Executive of the termination within 48 hours thereof and shall supply the Chief Executive with all the relevant particulars.
- A non-Seychellois worker aggrieved by the termination may initiate the grievance procedure within 7 days of becoming aware of the grievance.
- The registration of the grievance may be suspended if there are internal procedures of the employer for resolving disputes and they have been set in motion.
- If a non-Seychellois worker fails to lodge a grievance within 7 days, he will lose the right to do so, but the competent officer shall, if satisfied that such failure is not attributable to the fault of the worker or if the officer had himself suspended registration, allow the registration out of time.
- A competent officer shall complete mediation within 7 days from the date of registration of the grievance.
- The non-Seychellois worker or employer may, within 7 days of receiving the determination of the competent officer, appeal to the Minister.
- An employer of a non-Seychellois worker shall continue to provide such worker with food and shelter while the grievance of the worker is being dealt with by the competent officer or the Tribunal.
- If an agreement is reached at mediation the employer may subject to paragraph 9, cease to provide food and shelter to the worker.
- Where the mediation agreement provides that decides [sic] that the employer must pay employment benefits to the worker, the employer shall be liable to provide food and shelter to [to the worker] until the worker is paid such benefits.
- Where the employer does not pay employment benefits according to the mediation agreement and enforcement procedure before the Tribunal is commenced by the competent officer, the obligation to provide food and shelter to the worker shall come to an end.
- Whenever the employer's obligation to provide food and shelter ends, the employer shall provide air tickets to the non-Seychellois worker to return to the worker's

76 The procedure to be followed by a Seychellois worker is provided for under Part II of Schedule 1 to the Act.

country of origin. The employer may, however, provide air tickets at any time to the worker at his request.

Part IIA of Schedule 1 to the Act is applicable to a grievance procedure initiated under three circumstances: (1) where the employer has taken a disciplinary measure against a worker—under section 53(5); (2) where the employer has terminated the worker’s employment or the worker has terminated his/her employment—under section 61; and (3) where there is a dispute between the employer and worker which is not provided for under, inter alia, one of the above two situations—section 64. In the case of scenarios 1 and 2 above, the worker is still in the employment of the employer. In the case of scenario 3, the contract of employment has been terminated but there is still a possibility of the termination being reversed either by the worker or the employer.

The Act provides for another procedure to be followed by a non-Seychellois worker to initiate a grievance procedure where the employer takes a disciplinary measure against him/her upon the proof of a disciplinary offence—sections 52 and 55. Part III of Schedule 2 of the Act provides for a list of disciplinary measures which an employer may take against a worker. This procedure is regulated by Part IIA of Schedule 2 of the Act. Part IIA of Schedule 2 to the Act reproduces Regulations 1, 2, 3, 4 and 6 of Part IIA of Schedule 1 to the Act—reproduced above—verbatim and these regulations will not be repeated here. Below, I will highlight those Regulations which are unique to Part IIA of Schedule 2 of the Act.

Regulation 5 provides that:

A competent officer seized of a grievance shall within 7 days after registration of the grievance, invite the worker, the union, if any, the employer and employers [sic] organization, if any, for consultation. A record of the consultations shall be kept and a determination shall be made within 72 hours after the end of consultations.

Regulations 7 to 11 provide that:

7 An employer of a non-Seychellois worker shall continue to provide such worker with food and shelter while the grievance of the worker is being dealt with until the competent officer makes the determination.

8 Upon the determination of the competent officer, the employer may, subject to paragraph (9), cease to provide food and shelter to the worker whether an appeal against the determination is lodged by the worker or not.

9 Where - (a) the competent officer decides that the employer must pay employment benefits to the worker, the employer shall be liable to provide food and shelter to the worker until the worker is paid such benefits; (b) where an appeal is lodged by the employer, the employer shall continue to provide food and shelter until the determination of the appeal.

10 If the employer does not appeal, does not pay the said employment benefits and enforcement procedure before the courts is [sic] commenced by the Department, the obligation to provide food and shelter to the worker shall come to an end.

11 Whenever the employer's obligation to provide food and shelter ends, the employer shall provide air tickets to the non-Seychellois worker to return to the worker's country of origin. The employer may, however, provide air tickets at any time to the worker at his request.

There are differences and similarities between the grievance procedures under Part IIA of Schedule 1 to the Act and those under Part IIA to Schedule 2 to the Act. The similarities are that both grievance procedures are applicable in case an employer has terminated a worker's contract of employment on the ground that such a worker has committed a serious disciplinary offence—common Regulation 1.

A person aggrieved by the termination has the discretion of whether or not to initiate the grievance procedure—common Regulation 2. The use of the word 'may' implies that such a worker is not obliged to initiate such a procedure. However, if he/she decides to initiate the procedure, they must do so within seven days of 'becoming aware of the grievance.' Seven days should be interpreted to mean seven working days. Employers often write to workers informing them of the termination of their employment.⁷⁷ This is how they have become 'aware' of the grievance. A combined reading of common Regulations 3 and 4 shows that there are two ways in which a competent officer can allow a worker to lodge his/her grievance out of the seven-day time limit: (1) if 'such failure is not attributable to the fault of the worker'⁷⁸ or (2) 'if the officer had himself suspended registration.' The officer can suspend registration to enable the employer's internal dispute resolution process to be concluded. Should such a process be available, it is better for the worker to attempt to register the grievance with the competent officer and inform him/her of the ongoing process and then let the competent officer suspend the registration. In other words, the worker should 'cover' his/her back. Another similarity is that common Regulation 6 provides that an employer or worker has a right to appeal to the Minister if he/she is not satisfied with the determination of the competent officer. The appeal has to be lodged within seven days of receiving the determination.⁷⁹

77 Observation I made after reading through hundreds of files at the Tribunal. These cases include ET/210/12; ET/14/14; ET/39/14; ET/50/15; ET/109/15.

78 For example, *Gregoire's Company Ltd v Attorney General* [2022] SCSC 979 (the worker was sick); *Beau Vallon Properties v The Minister, Ministry of Employment and Social Affairs* [2022] SCSC 438 (worker out of the country). Both workers were Seychellois who failed to file their grievances within 14 days as required by the Act. The reasons in the cases apply to non-Seychellois workers with equal force.

79 ET/C/5/16 (The company filed an appeal after 11 days and the Minister dismissed it because it filed out of time). In *Universal Computers (Pty) Limited v The Attorney General (at the instance of the Ministry of Employment and Social Affairs)* [2023] SCSC 50, the competent officer refused to register

Common Regulation 6 in both Part IIA of Schedule 1 and Part IIA of Schedule 2 provides that a person aggrieved by the decision of a competent officer has a right to appeal to the Minister. The appeal has to be lodged within 14 days of the competent officer's decision⁸⁰ and the Minister has to give his ruling 'within 42 days or such longer period as may be prescribed after the date of lodgement of the appeal.'⁸¹ The Act allows the Minister to revoke his/her ruling in limited circumstances.⁸² This suggests that once the Minister has decided on the appeal, his verdict is final. However, like any other administrative action, the Supreme Court can review it.⁸³

There are also differences between the grievance procedures under Part IIA of Schedule 1 to the Act and that, under Part IIA of Schedule 2 to the Act. Firstly, Under Part IIA of Schedule 1 to the Act, parties can 'exit' from the mediation. In which case, the competent officer will issue a certificate—under section 61—that the mediation was unsuccessful. This certificate is presented to the Tribunal for it to be seized with the matter. However, under Part IIA of Schedule 2 to the Act—the consultation process—the grievance is finalised by the Ministry responsible for employment without the involvement of the Tribunal. This means that unlike under Part IIA of Schedule 1 to the Act where either a worker or employer can decline to enter into a mediation agreement and the matter is referred to the Tribunal, under Part IIA of Schedule 2 to the Act there is no 'exit' from the consultations.

Under section 61(1B) of the Act, if the mediation is successful, a competent officer '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.' This judgment is enforceable by the Tribunal. In practice, a competent officer files the agreement with the Secretary of the Tribunal who schedules a meeting (hearing) between the Tribunal and the parties to the agreement. At the meeting, the Tribunal asks both the employer and worker to confirm that they understand the terms and conditions of the agreement. Thereafter, the Tribunal endorses the agreement.⁸⁴ This normally happens after a few days of signing the agreement.⁸⁵ This provision is not applicable to a successful consultation provided for under Part IIA of Schedule 2 to the Act. In cases

the grievance of a non-Seychellois worker out of time. The worker appealed to the Minister who ordered the competent officer to register the grievance.

80 Section 65(2).

81 Section 65(6).

82 Section 65(8).

83 See *Vidot v Minister of Employment and Social Affairs* [2000] SCSC 14; *Cap Lazare v Ministry of Employment and Social Affairs* [2009] SCSC 68; *Javotte and Anor v Minister of Social Affairs and Employment* [2005] SCSC 71.

84 Observation by the author upon reading through the files on judgements by consent.

85 ET/JC/2/22; ET/JC/8/22; ET/JC/05/21 (two weeks after signing the agreement).

of consultation, the competent officer's decision is enforceable 'before the courts' by the relevant department in the ministry responsible for employment.⁸⁶

Regulation 5 of Part IIA of Schedule 1 requires the competent officer to complete the mediation within seven days 'from the date of registration of the grievance.' This means that the day on which the grievance was registered is also included in the seven days.⁸⁷ However, this excludes public holidays and weekends. During this mediation, only the employer and the worker are expected to attend. However, under Regulation 5 of Part IIA of Schedule 2, the competent officer is obliged to 'invite the worker, the union, if any, the employer and employers' organization, if any, for consultation.' In this case, it is not just a matter between the worker and the employer. The unions must also be invited if the worker or employer belongs to a union. In this case, the competent officer consults the parties. In other words, he/she does not mediate between the parties. After the consultation, a determination has to be made within 72 hours. There have been cases where employers have applied successfully to terminate the contract of non-Seychellois workers on the ground of redundancy.⁸⁸

Another difference is that under Regulation 7 Part IIA of Schedule 1, the employer of a non-Seychellois worker is obliged to continue providing food for him/her 'while the grievance of the worker is being dealt with by the competent officer or the Tribunal.' Under Part IIA of Schedule 2, the employer is obliged to provide food and shelter 'until the competent officer makes the determination.' Once the competent officer has made a decision, this obligation falls away. However, Regulation 9 Part IIA of Schedule 2—which is discussed in detail below—provides for circumstances in which an employer is still required to provide food and shelter to the worker whether or not the latter appeals against the decision of the competent officer. It should be recalled that Regulation 7 of Part IIA of Schedule 1 deals with 'mediation' and Regulation 7 Part IIA of Schedule 2 deals with 'consultations'. As the discussion below illustrates, the fact that Regulation 7 of Part IIA of Schedule 1 deals with mediation could be the ground on which the Tribunal has ordered employers to provide food and shelter to workers.

It has been illustrated above that it could take several weeks before a grievance is resolved—if one of the parties appeals against the decision of a competent officer. During that period, the worker's contract of employment is not yet terminated and the employer is still obliged to provide food and accommodation until the application for redundancy is approved or rejected. The Act provides for the circumstances in which an

86 Consultations are applicable to redundancies. The decision of whether or not an employer should terminate a contract of employment on the ground of redundancy has to be approved by the competent officer.

87 Section 57(1)(b) of the Interpretation and General Provisions Act 1976 (Chapter 130). See ET/C/23/14 (where the Tribunal referred to this provision when the employers were being prosecuted under s 76(1)(a) for failure to submit the payslips of their former non-Seychellois workers.)

88 See for example, Redundancy Analysis Bulletin, Policy Planning, Monitoring and Evaluation Section (Department of Employment) <<http://www.employment.gov.sc/e-library/statistics/2021/redundancy-analysis-bulletin?layout=default>> accessed 12 November 2022.

employer may or shall provide food and shelter to a non-Seychellois worker until a grievance initiated before the competent officer is finalised. It is to this issue that we turn.

Obligation to Provide Food and Accommodation/Shelter

An employer's obligation to provide food and shelter can be classified into two stages. The first stage is governed by Regulation 7. Once a worker has lodged a grievance with the competent officer, the employer has an obligation to provide food and shelter. In this case, the competent officer's order is not required for the employer to continue providing food and shelter. This is so because at this stage the worker is still deemed to be in the employment of the employer.

The second stage deals with the situation where the competent officer has made a 'determination.' The Act provides different circumstances in which a competent officer can make a determination. For example, he/she can determine whether an employer can terminate or not terminate a contract of employment.⁸⁹ Although the Regulations do not define the meaning of 'determination' within the context of Regulation 8, a combined reading of Regulations 8 and 9 shows that the Regulations are applicable to instances where the competent officer has determined that an employer can terminate a contract of employment. In such a situation, the employer has the discretion to decide whether or not to continue providing food and shelter to the worker and whether or not the worker appeals against the decision of the competent officer. This discretion is inferred from the use of the word 'may' as opposed to shall. If the employer decides not to appeal against the competent officer's decision, the employer-worker relationship comes to an end. However, if the employer decides to appeal against the decision, the employer-worker relationship can still be presumed to exist until the outcome of the appeal. However, the employer is not obliged to provide food and accommodation. It is argued that this puts a foreign worker in a precarious situation. He/she is at the mercy of the employer who terminated the contract of employment in the first place. It is very unlikely that the employer will be inclined towards providing food and accommodation in the case of appeal. He/she would not like to spend more money on such a former worker. This means that there may be a need for the Regulation to be amended to make it obligatory for the employer to provide food and accommodation in case the worker appeals against the decision of the competent officer. Otherwise, workers may be discouraged from appealing such decisions—because they know that they may end up being homeless or starving.

Under Regulation 9(a), the employer has an obligation to provide food and accommodation until he/she pays the employment benefits to the worker. Regulation 9(a) is applicable in cases where the competent officer has determined that the contract of employment should be terminated. Section 46 of the Act provides that workers on

⁸⁹ Section 57.

contract—whether continuous or fixed—are entitled to employment benefits. Under section 67 of the Act, non-Seychellois workers, shall ‘enjoy the same terms and conditions of employment as are applicable to Seychellois workers but may be given such additional benefits and privileges as the competent officer may authorise.’ The Act does not define or describe ‘employment benefits’. However, the Minimum Wage Regulations provide that employment benefits exclude ‘wages’ but include housing, transport, and food.⁹⁰ Employment benefits are also mentioned in other regulations and they include sickness and maternity or paternity benefits⁹¹ and uniforms.⁹² Once the employer has paid the wages and employment benefits due to the worker, his/her obligation to provide accommodation and food ends.

Regulation 9(b) is applicable in case where the competent officer has resolved the dispute in favour of the worker. This is the case, for example, where the competent officer determines that the employer should not terminate the contract of employment. In such a situation, the employer has an obligation to provide food and accommodation should he/she decide to appeal against the competent officer’s decision. This is so because the presumption is that the worker is still in the employer’s employment. Under Regulation 6, an appeal by a worker or employer lies with the Minister and it has to be registered within 7 days of receiving the competent officer’s determination.

Regulation 10 also provides for circumstances in which the employer’s obligation to provide accommodation and food comes to an end although the case may have been decided against him/her. For Regulation 10 to be applicable, all three conditions must be in place: (1) the employer does not appeal, (2) does not pay the said employment benefits and (3) enforcement procedure before the courts is commenced by the Department. In other words, the provisions must be read conjunctively. This is evident from the use of the word ‘and’ before the third condition.⁹³ This means that if the employer does not appeal but pays the employment benefits, he/she has an obligation to provide food and accommodation until the benefits are fully paid. He/she either pays the benefits voluntarily or the Department commences the enforcement procedure before the courts—this is the same situation as in Regulation 9(a). Likewise, if the employer does not appeal, for example, against the competent officer’s decision that the contract of employment should not be terminated, he/she must continue to employ the worker and also pay employment benefits. If he/she fails to do so, the Department commences the enforcement procedure before the courts. It is argued that for the better protection of the worker’s rights and the integrity of the office of the competent officer, Regulation 10 may have to be amended so that in cases where the employer does not

90 Regulation 2 of the Employment (National Minimum Wage) Regulations, (SI 55 of 2007, 31st December 2007).

91 Regulation 17 of the Employment (Conditions of Employment of Domestic Workers) Regulations (SI. 37 of 2019).

92 *ibid* reg 31.

93 The use of the word ‘and’ between two or more conditions imply that the sentences must be read conjunctively. See, for example, *Sivasankaran v BMIC Ltd and Ors* [2016] SCSC 8 para 28.

appeal and/or does not pay employment benefits and the Department commences the enforcement procedure before the courts, he/she should still be obliged to provide accommodation and food. Even if he/she does not do so and the worker inevitably spends his/her money on accommodation and food, a court should have the power to order the employer to reimburse the worker the expenses incurred while waiting for him/her to obey a competent officer's order.

Obligation to Provide Air Tickets

Under Regulation 11, an employer, when his/her 'obligation to provide food and shelter ends' is required to 'provide air tickets to the non-Seychellois worker to return to the worker's country of origin.' A closer look of Regulation 11 in conjunction with other Regulations discussed above shows that the obligation to provide food and shelter ends once the employer has paid all the employment benefits due to the worker in case the competent officer decided that the employer was justified in terminating the contract. However, his/her obligation to provide air tickets does not depend on his/her failure to implement the competent officer's decision under Regulation 10. In other words, if the employer's obligation to provide food and shelter falls away because he/she 'does not appeal does not pay the said employment benefits and [the] enforcement procedure before the courts is commenced by the Department' he/she is not required to provide the air tickets. Otherwise, this would render the enforcement procedure futile as the worker would have left Seychelles by the time the enforcement procedure is concluded. Although the word 'air tickets' is used, it should be interpreted to include the singular.⁹⁴ The obligation is to provide 'air tickets' and not other tickets to use other means of transport such as water.

The obligation under Regulation 11 is to provide a ticket to return the worker to his/her 'country of origin'. This is the same language used in Article 67 of the Convention on Migrant Workers. Article 6(a) of the Convention defines 'state of origin' to mean 'the State of which the person concerned is a national.' There is room for the argument that 'state of origin' should not necessarily mean the worker's country of nationality or citizenship. It could also mean the country from which he/she originated to come and take up employment in Seychelles. That is, a 'State of habitual residence' as contemplated in Article 1(2) of the Convention. It also means that the ticket should return the worker to the exact airport from which he/she commenced his/her journey to come and take up employment in Seychelles. This is especially important in countries where there is more than one international airport. As shown below, the Tribunal has held that such a ticket should cover the whole journey from Seychelles to the employer's final destination—airport of origin.

94 Section 20 of the Interpretation and General Provisions Act (n 87) provides that 'In an Act, words in the singular include the plural and words in the plural include the singular.'

An employer or worker must obey the competent officer's decision/order otherwise he/she commits an offence under section 76 of the Act. Employers have been prosecuted for various offences under section 76 such as failure to comply with the order of the minister—employers failing to pay legal employment benefits—⁹⁵to salary arrears,⁹⁶ and to pay terminal employment benefits.⁹⁷ Employers have also been prosecuted for failure to submit proof that the foreign workers had the right to work in Seychelles.⁹⁸ As mentioned above, there are two types of grievance procedures under the Act: a grievance procedure before a competent officer and a grievance procedure before the Tribunal. However, as the discussion below illustrates, there are instances in which the two procedures supplement each other. Our discussion turns to the discussion of the grievance procedure before the Tribunal.

Grievance Procedure Before the Employment Tribunal

A worker whose contract of employment has been terminated has a right to initiate a grievance procedure under section 61(1) of the Act.

(1) ...

(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.

95 ET/C/2/2010 (Company pleaded guilty and convicted); ET/C/4/2010 (A natural person was convicted and fined and ordered to pay legal benefits monthly—he had to sell his land because he wasn't working).

96 ET/C/8/2010 (matters settled and case closed); ET/C/43/2009–ET/C/45/2009; ET/C/24/2009 (payments made and cases withdrawn). In the following cases, the private companies made payment: ET/C/12/2009; ET/C/13/2009; ET/C/14/2009.

97 ET/C/02/2009 (natural person made payment and case set aside).

98 ET/C/27/14 (In this case the company pleaded guilty to failing to submit copies of contracts of employment, pay slips and work permits of all its non-Seychellois workers. The Tribunal imposed a fine—the documents were later submitted. The Tribunal considered that the accused company was a 'first offender' as a mitigating factor).

(1E) A party to a grievance shall bring the matter before the Tribunal within 30 days if no agreement has been reached at mediation.

Section 61(2) provides for the remedies which the Tribunal may grant to workers if it finds that the termination of the contract was either justified or unjustified. Since section 61 has been recently discussed in detail, it is beyond the scope of this article to repeat that discussion.⁹⁹ This discussion is limited to the extent to which the Tribunal has dealt with grievances initiated by non-Seychellois workers. Section 61 provides for two processes in which a grievance may be resolved. Firstly, it could be resolved by a competent officer through mediation. If this fails, the matter is referred to the Tribunal. The discussion below illustrates how these two procedures have been used to protect the rights of non-Seychellois workers.

Successful Mediation

Sections 61(1A)–(1C) provide that if the mediation is successful, the competent officer draws up a mediation agreement which becomes a judgement by consent after being endorsed by the Tribunal. Such an agreement is enforced by the Tribunal. Since its establishment, the Tribunal has endorsed 133 mediation agreements.¹⁰⁰ At mediation, the competent officers have dealt with issues, such as unpaid legal benefits—salaries and payment in lieu of notice—¹⁰¹and unjustified termination of employment.¹⁰² The practice is that a mediation agreement is signed between the parties and the competent officer sends a copy of the agreement to the Tribunal. Where a party cannot sign, he/she will affix their fingerprint.¹⁰³ Most mediation agreements include a paragraph which shows that the mediation officer explained to the parties the advantages of mediation—which are to save time and costs.¹⁰⁴ Most of these judgements by consent have dealt with straightforward issues such as payment of employment benefits. Many employers have paid such benefits pursuant to mediation.¹⁰⁵ There are also instances where employers have initiated the grievance procedure against workers. Copies of mediation agreements show that workers agree to refund the employer’s salaries paid in advance¹⁰⁶

99 See generally, Jamil Ddamulira Mujuzi, ‘The Seychelles Employment Tribunal and its Application and Interpretation of the Grievance Procedure Provisions under the Employment Act’ 2022 (43) *Industrial Law Journal* 1499.

100 Information the author gathered from the Tribunal’s Register.

101 ET/JC/7/15; ET/JC/4/22; ET/JC/7/20.

102 ET/JC/9/22.

103 ET/JC/19/14.

104 ET/JC/7/22; ET/JC/9/22; ET/JC/4/22.

105 ET/JC/01/14; ET/JC/24/14; ET/JC/25/14; ET/JC/20/14; ET/JC/21/14; ET/JC/04/14; ET/JC/05/14; ET/JC/06/14; ET/JC/07/14; ET/JC/08/14; ET/JC/09/14; ET/JC/10/14; ET/JC/11/14; ET/JC/12/14; ET/JC/13/14; ET/JC/19/14; ET/JC/03/15; ET/JC/08/13; ET/JC/04/10 ; ET/JC/05/10; ET/JC/06/10.

106 ET/JC/02/14; ET/JC/01/13; ET/JC/02/13; ET/JC/4/13; ET/JC/5/13; ET/JC/01/12; ET/JC/07/12; ET/JC/01/11; ET/JC/02/10.

or one-month salary in lieu of notice.¹⁰⁷ Payment can be made in instalments¹⁰⁸ or by lump sum.¹⁰⁹ Most of the mediation agreements state that payment is to be made to the Tribunal. However, payment can also be made through the bank and proof of payment submitted to the Tribunal.¹¹⁰ The applicant does not have to be present for the Tribunal to enforce the judgment. Enforcement is triggered if payment is not made.¹¹¹ The employment Tribunal monitors each payment to ensure compliance.¹¹² Failure to pay, the Tribunal will remind the debtor—‘notice to comply’—and specify the date by which payment should be made.¹¹³ If payment is not made by that date, the Tribunal will issue a ‘notice to show cause’ why the respondent should not be fined or committed to prison for disobeying the Tribunal’s order.¹¹⁴ If the respondent does not answer the summons, the Tribunal will issue a warrant of arrest.¹¹⁵

Although in the majority of cases, the mediation agreements have been signed by the employers and Seychellois workers, there are also a few instances in which these agreements have been signed by employers and non-Seychellois workers. For example, in one case, a mediation agreement was signed between the employer and 35 foreign workers. The employer had not paid the workers for two years. The mediation agreement was reached ‘after lengthy discussion’ and the parties agreed that the respondent was to repatriate the applicants to their ‘homeland’. The respondent also agreed to pay the unpaid salaries ‘within three months from the date of reaching this agreement’ and to pay a small amount per day ‘effective one month after the expiry’ of their contracts of employment until their departure to their ‘homeland’.¹¹⁶ However, the respondents delayed making the payment and the Tribunal ordered that the proceeds from the sale of their land be paid to the Ministry responsible for employment which

107 ET/JC/15/14; ET/JC/17/14; ET/JC/18/14; ET/JC/22/14; ET/JC/01/15; ET/JC/02/15; ET/JC/03/13; ET/JC/06/13 (one-month notice in lieu of notice and loan); ET/JC/09/13; ET/JC/02/19.

108 See for example, ET/JC/7/22; ET/JC/7/15; ET/JC/9/22; ET/JC/4/22.

109 ET/80/12.

110 ET/JC/05/15; ET/JC/06/15.

111 ET/JC/14/14.

112 ET/JC/02/14; ET/JC/03/14; ET/JC/03/12 (workers making payment for one-month payment in lieu of notice). See also ET/JC/4/22 (company paying for one-month salary in lieu of notice); ET/JC/7/20 (employer gave Covid-19 as a reason for non-payment and ordered to pay).

113 ET/JC/07/10 (employer to pay salary); ET/JC/05/09 (employer paying one-month notice); ET/JC/08/09; ET/JC/09/09 (employer paying accrued leave and length of service); ET/JC/11/09 (worker to pay advance salary and money spent on training); ET/JC/12/09 (worker paying salary in advance).

114 ET/JC/23/14 (payment of salaries, accrued leave and length of service); ET/JC/05/15 (employment benefits); ET/JC/11/15 (length of service); ET/JC/07/13 (final settlement for one-month salary, annual leave and length of service); ET/C/2/2010 (The company agreed to pay benefits in six months but defaulted and the Tribunal ordered it to show cause why no payment was being made. The director made payment and the case was closed).

115 ET/JC/03/14; (warrant of arrest issued against the director of the company who failed to pay salary instalments). ET/JC/05/12 (worker defaulted on payment for one-month salary in lieu of notice).

116 ET/JC/08/12–ET/JC/10/12.

was used to pay the outstanding legal benefits and air tickets.¹¹⁷ The mediation procedure should be distinguished from a situation where parties before the Tribunal agree to settle the case ‘out of court’ and present the terms and conditions of the settlement to the Tribunal for endorsement. This is not registered as a judgement by consent as it happens subsequent to the competent officer issuing a certificate to the effect that mediation had been unsuccessful.¹¹⁸ Should the respondent fail to honour the terms of the agreement—the Tribunal will enforce it.¹¹⁹ In some instances, non-Seychellois workers have withdrawn their grievances before the Tribunal after reaching a settlement with the employer. However, the case will only be closed once the Tribunal is satisfied that the employer paid the non-Seychellois worker their legal terminal benefits in full.¹²⁰ This ensures that the workers are not left at the mercy of the employers. This takes us to the role the Tribunal has played in the protection of the rights of non-Seychellois workers in cases where mediation before the competent officer was not successful.

The Role of the Tribunal

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.’ Section 61(1D) has been interpreted by the Tribunal, the Supreme Court and the Court of Appeal and it is beyond the scope of this article to discuss those interpretations as they have been discussed in a recent publication.¹²¹ However, it is important to highlight the manner in which section 61(1D) has been invoked in cases of non-Seychellois workers. Jurisprudence from the Tribunal shows that there are two main circumstances in which the competent officer issued the certificate to non-Seychellois workers under section 61(1D) of the Act. First, the mediation was unsuccessful because the parties failed to agree on a settlement.¹²² Second, that the respondent failed to appear before the officer for mediation although he/she/it was reminded at least two times.¹²³ In one case, the mediation officer issued a certificate because the parties ‘failed partially to come to an agreement.’ However, the certificate doesn’t disclose which issues were agreed upon.¹²⁴ The first ground is what is contemplated under section 61(1D) of the Act—the competent officer is justified to issue a certificate. However, should the respondent fail to appear before the competent officer, he/she should not issue a certificate. This is because no negotiations took place.

117 ET/JC/08/12–ET/JC/10/12.

118 ET/69/16; ET/233/18, ET/79/16.

119 ET/68/17–ET/70/17 (The respondent had given notice to pay salaries as agreed. He paid and the matter was set aside).

120 ET/115/12–ET/120/12 (all cases combined).

121 Mujuzi (n 99).

122 ET/70/13; ET/02/14; ET/39/14; ET/109/15; ET/115/12 – ET/120/12 (combined cases); ET/06/08; ET/80/12; ET/115/16.

123 ET/155/13; ET/211/13; ET/18/10; ET/102/10; ET/271/18.

124 ET/69/16.

A competent officer may invoke section 76(1)(c) of the Act and prosecute the respondent for intentionally obstructing, hindering or delaying ‘a competent officer or any other person in the exercise of the functions of the officer under the Act.’ A person convicted of this offence ‘is liable to pay a fine.’¹²⁵ The Act does not contemplate a situation of ‘partial’ mediation agreements. Either the mediation is successful or it isn’t. I will illustrate how the Tribunal has ensured that the rights of non-Seychellois workers are protected—procedurally and substantively.

Procedurally

Application fees

For a worker to have his/she right to be protected by the Tribunal, he/she must have access to the Tribunal. For any person to lodge a complaint before the Tribunal, he/she is required to pay an application fee as prescribed by the Minister.¹²⁶ However, Rule 8(3) of Schedule 6 to the Act provides that ‘[t]he Secretary [of the Tribunal] may waive application fees where an applicant gives valid reasons for not being able to pay such fees.’ Practice from the Tribunal shows that most non-Seychellois workers have paid the application fees.¹²⁷ However, as the discussion below shows, there have been instances where some non-Seychellois workers have applied to the Secretary of the Tribunal to waive the application fees. These have been cases where their employers have not paid them salaries. The Tribunal has followed two approaches in cases where waivers have been made. The first approach is to grant an unconditional waiver in terms of which the workers do not undertake to pay the application fees at a later stage—for example, when their salaries are paid.¹²⁸ The second approach is where a waiver has been granted conditionally and the workers undertake to pay the application fees on completion of the case—they complete an ‘acknowledgement of debt’ form.¹²⁹ Once the workers have received their payments, they pay the application fees.¹³⁰ The waiver ensures that workers are not barred from approaching the Tribunal on the sole ground of poverty.

Legal presentation

Rule 6(5) of Schedule 6 to the Act provides that ‘[a] party before the Tribunal may be represented by a lawyer or by a representative of a trade union or an employers’ organization or any other person as the case may be.’ The use of the word ‘may’ implies that an employer or worker has a choice either to represent himself/herself before the Tribunal or to ask any of those mentioned people or entities to represent them. Practice

125 Section 77(1) of the Act.

126 Rule 10(c) of Schedule 6 to the Act.

127 Receipts on the files show that they each paid R200.

128 ET/70/13; ET/103/13; ET/02/14.

129 ET/184/13; ET/50/15; ET/234/18; ET/235/18–ET/242/18.

130 ET/235/18–ET/242/18 (receipts on the files).

from the Tribunal shows that non-Seychellois workers have represented themselves,¹³¹ by private lawyers,¹³² consultants,¹³³ colleagues,¹³⁴ unions¹³⁵ and non-governmental organisations.¹³⁶ However, in some cases, the files are silent on whether or not the workers were represented.¹³⁷ The fact that migrant workers belong to unions shows that Seychelles complies with Article 26 of the Convention which recognises the right of migrant workers to join trade unions.

Remedies

Rule 5 of Schedule 6 to the Act provides for the powers of the Tribunal. Rule 7 of Schedule 6 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 combined reading of Rules 5 and 7 shows that the Tribunal can only grant remedies 'at the conclusion of proceedings.' The remedy given by the Tribunal will be determined by the grievance registered by the applicant.

Payment of Outstanding Legal Benefits

Many of the grievances the non-Seychellois workers have filed before the Tribunal relate to the employers' unjustified termination of employment and/or failure to pay legal benefits. The Tribunal has ordered the employers to pay non-Seychellois workers their employment benefits such as outstanding salaries and compensation in lieu of notice.¹³⁸ The challenge though is some cases when the Tribunal orders employers to pay workers' outstanding legal benefits, that in it doesn't set a deadline for payment.¹³⁹ The Tribunal monitors each and every payment.¹⁴⁰ However, even when it does not set a deadline, it expects payment to be made within a few days.¹⁴¹ If employers do not make payment in what the Tribunal considers to be a reasonable time, the Tribunal summonses them to show cause why they should not be imprisoned.¹⁴² If they fail to come to the Tribunal to explain their position, the Tribunal will issue a warrant for their arrest.¹⁴³ If the employer cannot make a lump sum payment, the Tribunal will allow

131 ET/14/14; ET/149/15; ET/103/13.

132 ET/06/08; ET/07/08; ET/82/09; ET/18/10; ET/69/16; ET/79/16.

133 ET/80/12–ET/87/12.

134 ET/184/13.

135 ET/113/16; ET/114/16; ET/115/16; ET/68/17–ET/70/17; ET/27/18; ET/235/18–ET/242/18; ET/70/13; ET/02/14; ET/15/14–ET/20/14 (consolidated cases against the same employer).

136 ET/234/18.

137 ET/115/12–ET/120/12 (combined cases).

138 ET/82/09; ET/18/10; ET/06/08; ET/07/08.

139 ET/82/09; ET/18/10.

140 ET/80/12.

141 ET/295/10 (The reminder was sent when payment was not made after seven days).

142 ET/18/10.

143 ET/33/12.

him/her to pay by instalments.¹⁴⁴ Where payment is not made after a lengthy time, the Tribunal may also approach the Supreme Court to issue a ‘warranty of levy’ in terms of which the debtor’s property is attached and sold to pay the creditors. Section 33 of the Act allows an employer, before he/she pays the worker’s outstanding benefits at the termination of the contract of employment, to deduct some expenses he/she incurred in relation to the worker. They include taxes to be paid by the worker and unreturned company property.¹⁴⁵ However, they exclude air-ticket fares—which brought workers to Seychelles.¹⁴⁶ This implies, *inter alia*, that migrant workers have a right to transfer their earnings and savings to their countries of origin under Article 32 of the Convention.

The Tribunal’s default position is to order the employer to pay the worker’s outstanding legal benefits whether or not it finds that the termination of employment was unlawful. For example, in one case, the employer terminated the employment of eight non-Seychellois workers on the ground of absenteeism. The Tribunal found that ‘all eight Applicants were unlawfully terminated and as such they were entitled to be paid their salary from ... until the date of lawful termination—date of this judgement.’¹⁴⁷ This is the case although the Tribunal has the power to order the reinstatement of a worker or to make compensatory orders—in addition to the order to pay salaries and compensation in lieu of salaries. The Tribunal has held that a compensatory award ‘can only be made at the end of the proceedings ... when a case has gone through a full-blown hearing at the conclusion of the case’ and that it doesn’t apply to settlements reached.¹⁴⁸

Some employers behave in a manner that makes it very difficult or impossible for non-Seychellois workers to be paid their legal benefits before they leave Seychelles. For example, in one case the Tribunal, in an *ex parte* judgment on 11 November 2010, ordered the employer to pay the outstanding salary of a non-Seychellois worker he had not paid upon termination of her employment. However, the employer refused to pay and on 24 November 2010 the Tribunal reminded him to make the payment. He ignored the order and on 6 December 2010, the Tribunal issued a summons against him to show cause why he should not be committed to prison for failure to pay. On 16 November 2010, he filed a notice of appeal against the Tribunal’s decision to the Supreme Court. On 10 December 2010, the Tribunal informed the worker that they had to wait for the outcome of the appeal before enforcing payment. On 10 June 2011, the Tribunal was contemplating enforcing the order of 11 November 2010. However, on 02 July 2011, the case was adjourned *sine dire* as there was nobody representing the applicant as she had left the country on 29 December 2010. There is no record that she was ever paid. The Tribunal had also not ordered the employer to provide her with food and

144 ET/33/12 (payment made in four instalments over a period of four months).

145 ET/109/15.

146 ET/39/14.

147 ET/99/19–ET/106/19 para 24.

148 ET/39/14.

accommodation.¹⁴⁹ In this case, the employer could have been encouraged to disregard the order of the Tribunal because he was not paying for the worker's food and accommodation. In cases of this nature, the Tribunal should order the employer to pay for the worker's food and accommodation until the case is finalised. Otherwise, some employers may use the appeal process as a delaying tactic to render the Tribunal's orders useless.

Sometimes employers of non-Seychellois workers find it difficult to get a remedy when a worker breaches his or her contract of employment and leaves Seychelles. For example, in one case, a non-Seychellois worker didn't give notice of termination of employment and left the jurisdiction. The employer asked the Tribunal to order the worker to compensate him a one-month salary in lieu of the notice. A summons was served on the worker who was abroad—Indonesia.¹⁵⁰ When the worker didn't answer the summons, the application was heard *ex parte* and the Tribunal ordered the worker to pay the employer the equivalent of a one-month salary in lieu of notice.¹⁵¹ Because the worker had a bank account in Seychelles, the Tribunal ordered the bank to transfer money from the worker's account to the employer but the money was insufficient.¹⁵² Consequently, the employer, although he was not fully paid, asked the Tribunal to set the case aside.¹⁵³

Whether or not the employer will also be required to provide food and shelter before the last instalment is paid is an issue that the Tribunal has approached differently. In some cases, it has been held that the employer does not have to pay for the worker's food and shelter. This is so because the employer-worker relationship has ceased to exist.¹⁵⁴ If a worker registers a grievance when his or her visa is about to expire before the Tribunal concludes the hearing, the Tribunal will advise him/her to apply for a visa extension.¹⁵⁵ This takes us to the circumstances in which the Tribunal can order employers to provide food and shelter to the workers whose contracts of employment have been terminated.

Obligation to Provide Food and Shelter

Although in some cases the Tribunal resolves the grievance as soon as possible,¹⁵⁶ there are instances in which it takes several months before a grievance is finalised.¹⁵⁷ For

149 ET/295/10.

150 ET/211/13.

151 ET/211/13 (USD 2528).

152 ET/211/13.

153 ET/211/13.

154 ET/33/12.

155 ET/80/12.

156 For example, in ET/103/13 (the grievance was resolved in three months); ET/155/13 (the grievance was resolved in five months).

157 For example, in ET/210/12, the matter spent over two years at the Tribunal and when the Tribunal ordered the employer to compensate the worker, he appealed to the Supreme Court. In ET/JC/5/22

example, in one case, non-Seychellois workers registered their grievance with the Tribunal on 12 September 2012, it was heard by the Tribunal on 20 September 2012 and by 4 December 2012, the employer had paid the workers' outstanding salaries and bought the air-tickets for their repatriation.¹⁵⁸ Some grievances are resolved after a few days. For example, in another case, the non-Seychellois workers registered their grievance with the Tribunal on 8 May 2013 and on 16 May 2013 the Tribunal heard the grievance and closed the case because the employer had paid their salaries and bought their air tickets.¹⁵⁹ In one case, the grievance was filed on 10 October 2013 and an agreement between the parties was reached on 18 October 2013.¹⁶⁰ There is also a case in which the Tribunal ordered the employer to pay all the amount he owed to the applicant within two days and when he didn't pay and also failed to appear before the Tribunal to explain he had not paid, the Tribunal issued a warrant for his arrest. He paid immediately to avoid being committed to prison.¹⁶¹

Where a worker registers a grievance with the Tribunal, for example, over non-payment of their salary or unjustified termination of a contract of employment, the issue of their feeding and shelter, while the grievance is still pending, becomes important. Rule 7 of Part IIA of Schedule 1 to the Act provides that '[a]n employer of a non-Seychellois worker shall continue to provide such worker with food and shelter while the grievance of the worker is being dealt with by the competent officer or the Tribunal.' The use of the word 'shall' means that the employer has no discretion but to provide food and shelter while the grievance is being dealt with by Tribunal. The Supreme Court held that once a non-Seychellois worker files a grievance with the Tribunal, 'the claim for payment [of] housing and food' becomes 'a statutory entitlement... as opposed to an entitlement under the contract.'¹⁶² The Tribunal has taken two approaches to the issue of food and shelter. The first approach is to order the employer to provide food and shelter to the worker—in the actual sense. In other words, the employer pays for food and shelter. Where the employer provides shelter to the workers and the workers complain about the conditions of the shelter, the Tribunal, together with officials from other relevant government departments, will inspect the shelter and assess its appropriateness or otherwise for human habitation.¹⁶³ This ensures that Seychelles complies with Article 43(3) of the Convention. There are also instances where the Tribunal does not order the employer to provide food and shelter. However, he/she does so voluntarily. For example, in once case the file states that by 'consent of the parties' the employer provided food and shelter from the time of termination of the contract until

and ET/JC/0/22 the employer agreed to pay the outstanding salaries in instalments within 11 months; in ET/JC/05/21 the employer accepted to pay within 17 months.

158 ET/183/12.

159 ET/70/13 (the case involved 88 non-Seychellois workers).

160 ET/184/13.

161 ET/127/15 (the complainant was a domestic worker).

162 *Beau Vallon Properties Limited v Bhasin* [2022] SCSC 174 para 29.

163 ET/06/08; ET/07/08.

the date of the Tribunal's order.¹⁶⁴ The second approach is to order the employer to pay the worker a specified amount and the worker looks for suitable accommodation.¹⁶⁵

A close look at Rule 7 of Part IIA of Schedule 1 to the Act shows that once the Tribunal has handed down its decision, the employer's obligation to provide food and shelter comes to an end. Thus, in one case, the file states that by 'consent of the parties' the employer provided food and shelter from the time of termination of the contract until the date of the Tribunal's order.¹⁶⁶ However, in some cases employers pay outstanding salaries in instalments and this could take several weeks or months before payment is completed. For example, in one case the employer took three months to complete the payment of the outstanding salaries of non-Seychellois workers.¹⁶⁷ In order to avoid a situation where workers may find themselves without food or shelter, in one case the Tribunal ordered that the employer 'shall continue to provide them with food and shelter until they are repatriated.'¹⁶⁸ Imposing such an obligation on the employers ensures that they do their best to pay the outstanding salaries of their former workers and also repatriate them as soon as possible. An employer who, contrary to the order of the Tribunal, fails to provide food and shelter to the workers will be convicted for disobeying the order of the Tribunal and committed to prison.¹⁶⁹

Practice suggests that a non-Seychellois worker has to apply to the Tribunal to order the employer to provide him/her with food and accommodation before the Tribunal can make such an order.¹⁷⁰ In such cases, the Tribunal can only make the order when it is fully constituted.¹⁷¹ The fact that the worker is no longer working for the employer is not a basis for him/her to refuse to provide food and accommodation when the matter is pending before the Tribunal.¹⁷² However, if the employer is facing 'seriously difficulties', the Tribunal will consider them as good reasons for not complying with the order of providing food.¹⁷³ In cases where workers have not requested the Tribunal to make orders for food and shelter, it has not made such orders.¹⁷⁴ Where a worker has a house in Seychelles, the employer is not obliged to pay for accommodation. However, the Tribunal may order him/her to pay for the worker's food.¹⁷⁵ Where a worker has

164 ET/69/16.

165 ET/127/15.

166 ET/69/16.

167 ET/02/14.

168 ET/99/19–ET/106/19 para 26.

169 ET/127/15; ET/06/08.

170 ET/80/12 (the Tribunal ordered the employer to provide food and accommodation); ET/06/08; ET/07/08 (the employer had not provided food for two months).

171 As per Rule 6(1) of the Schedule 6 to the Act. See ET/149/15.

172 ET/06/08 (the worker was unemployed).

173 ET/06/08.

174 ET/210/12; ET/233/18; ET/115/12–ET/120/12 (all cases combined); ET/155/13; ET/02/14; ET/18/10; ET/295/10. In ET/102/10 (the applicant did not request for shelter or food) ET/282/10 (the applicant withdrew the case).

175 ET/82/09 (the Tribunal determined the amount per day for food).

incurred food and accommodation expenses while pursuing the application, the Tribunal will order the respondent to reimburse him/her those expenses.¹⁷⁶

Obligation to Provide an Air-ticket

The Tribunal has held that employers are responsible for the costs of repatriating non-Seychellois workers ‘back to their home country.’¹⁷⁷ The Tribunal has followed two approaches on the issue of tickets. The first approach is to require the employers to buy the tickets and hand them over to the workers. Copies of these tickets are included in the workers’ files at the Tribunal.¹⁷⁸ The second approach is to order the employer to provide money to the workers to buy the tickets. Proof of the provision of such money is included in the workers’ files at the Tribunal.¹⁷⁹ In all cases where the Tribunal has ordered employers to either buy tickets or provide money to the workers to buy tickets, the workers had specifically raised the issue of tickets as one of the grievances. In other words, they asked the Tribunal to order the employers to provide such tickets.¹⁸⁰ In cases where the workers have not asked the Tribunal to order the employers to provide tickets, the Tribunal has not made such orders although it found that the employment relationship between the worker and the employer had ended. Even if the employer refuses or fails to appear before the Tribunal, it will hear the grievance *ex parte* and order him/her to provide the workers with tickets.¹⁸¹ An employer has a duty to buy an air ticket for the worker even if the worker terminates the contract of employment against the wishes of the employer.¹⁸² In the case where the employer and the worker agree that the employer will buy the tickets, there is no need for the Tribunal to make an order.¹⁸³

The obligation imposed on employers to provide tickets to workers ensures that the workers are not stranded in Seychelles when their contracts of employment are terminated or come to an end. Otherwise, the government may have to incur the costs of their repatriation. The employer’s obligation is to ‘provide air tickets to the non-Seychellois worker to return to the worker’s country of origin.’ This means the country of the worker’s nationality. However, Article 1(2) of the Convention also recognises the worker’s ‘State of habitual residence.’ That is, the State from which the worker originated to take up employment in Seychelles. When ordering employers to provide air tickets to workers, the Tribunal has followed one of the two approaches. Its order

176 ET/33/12.

177 ET/99/19–ET/106/19 para 26.

178 ET/02/14; ET/82/09; ET/18/10; ET/115/12–ET/120/12 (combined cases); ET/70/13.

179 ET/69/16; ET/233/18; ET/32/14; ET/155/13.

180 See for example, ET/103/13; ET/210/12.

181 ET/15/14–ET/20/14 (consolidated cases against the same employer who was also ordered to pay the salaries).

182 ET/33/12.

183 ET/39/14; ET/127/15; ET/70/13.

either mentions both the city—airport—and country of destination¹⁸⁴ or only the country of destination.¹⁸⁵ In other words, the ticket must take the employee to his final destination.¹⁸⁶ If a worker bought his/her ticket to travel to Seychelles to take up employment, the employer will reimburse him/her that money and also buy him/her a ticket to return to his/her country of origin once the employer-worker relationship has come to an end.¹⁸⁷

Criminal Jurisdiction of the Tribunal

Section 76 of the Act creates different offences for employers and workers. The criminal jurisdiction of the Tribunal has been discussed in detail in a recent article and will not be repeated here.¹⁸⁸ The discussion here will illustrate how the Tribunal has used its criminal jurisdiction to protect the rights of non-Seychellois workers and their employers.

The two most common grievances registered by non-Seychellois workers are unlawful termination of employment and refusal/failure to pay salaries. Under section 32 of the Act, employers have to pay wages. Section 76(2)(d) of the Act provides that an employer commits an offence who ‘without reasonable excuse, fails on demand to pay in accordance with section 32(2) or (3) any wages due to a worker.’ A person convicted of that offence is liable to pay a fine under section 77 of the Act. Practice from the Tribunal shows its criminal jurisdiction has been invoked successfully to compel employers of Seychellois¹⁸⁹ and non-Seychellois workers to pay their salaries—as illustrated shortly. Three approaches have been followed. In the first approach, employers are prosecuted and before they are convicted, if they pay all the salaries, the prosecution against them is stopped—the case is withdrawn. This approach has been followed, for example, where a company failed to pay the salaries of 103 foreign nationals for three months,¹⁹⁰ a company failed to pay the salaries of over 60 foreign workers for one month,¹⁹¹ and where a company failed to pay the salaries of its 13 non-Seychellois workers for 10 months.¹⁹² The second approach is for the employer to be prosecuted, convicted, ordered to pay a fine and also pay the salaries.¹⁹³ For example, in one case, the company was convicted on its guilty plea for failing to pay the salaries

184 ET/233/18; ET/18/10 (city and country).

185 ET/69/16; ET/103/13; ET/210/12.

186 ET/18/10 (the worker lived in Strasburg, but the ticket stopped in Frankfurt and the Tribunal ordered the employer to buy a new ticket).

187 ET/14/14; ET/32/14; ET/39/14.

188 Jamil Ddamulira Mujuzi, ‘The Criminal Jurisdiction of the Seychelles Employment Tribunal’ (2022) 35(2) *South African Journal of Criminal Justice* 198–221.

189 See for example ET/C/09/09; ET/C/28/09; ET/C/27/09; ET/C/26/09.

190 ET/C/03/12 (prosecution under section 76(2)(c) and (d)).

191 ET/C/04/13. See also ET/C/06/13 (where a company failed to pay five workers for one month but later paid and the case was withdrawn).

192 ET/C/07/13 (prosecution under section 76(2)(d)).

193 ET/C/14/13; ET/C/2/14.

of 71 non-Seychellois workers and sentenced to a fine.¹⁹⁴ There are also other cases in which employers, especially companies, have been convicted of failing to pay the salaries of non-Seychellois workers.¹⁹⁵

Some of the companies convicted by the Tribunal for failing to pay their workers' salaries are repeat offenders. For example, in one case, a company was convicted on more than one occasion—plea of guilty—for failing to pay wages of non-Seychellois workers.¹⁹⁶ This raises the question of whether such a company should still be allowed to recruit non-Seychellois workers. It appears that when companies are convicted by the Tribunal, their 'criminal records' are only relevant for the purpose of sentencing for a subsequent contravention of the Act. This could explain why such repeat offenders continue to employ people. There may be a need for the Ministry of Employment to closely scrutinise such companies so that they don't subject other non-Seychellois workers to such treatment. This is an obligation Article 66(2) of the Convention imposes on Seychelles.

The third approach is for the employer to be threatened with criminal prosecution and before the prosecution is commenced, he/she pays the salaries. For example, one company employed 18 non-Seychellois workers from January 2011 to August 2012. However, from April 2012, the employer failed to pay salaries and in August 2012 the workers asked the Tribunal to order the respondent to pay their salaries, air tickets, the cost incurred in lodging the case, and provide adequate food and shelter 'pending the making of its final decision' and 'the tribunal to make any other orders that it deems fit.'¹⁹⁷ On 20 October 2012, the Tribunal ordered the employer to pay the salaries, airfares and provide food and accommodation until the repatriation of the applicants.¹⁹⁸ However, by 10 November 2012, no payment had been made and the employer refused to provide food unless the applicants worked for him. The applicant's lawyer asked the Tribunal to invoke its criminal powers. Before the employer could be prosecuted, he paid the salaries and airfares, and the case was then closed.¹⁹⁹

It is an offence under section 76(1)(a) of the Act if a person 'fails to produce or submit any record, document or return or furnish any information when required under this Act or by a competent officer.' There are cases in which employers have been convicted under section 76(1)(a) for failing to submit proof of payment of the salaries of their Seychellois²⁰⁰ and non-Seychellois workers. In one case, a company was prosecuted for failing to submit proof of payment of the salaries of 71 non-Seychellois workers and

194 ET/C/14/13 (76(2)(d)).

195 ET/C/14/21; ET/C/42/09.

196 ET/C/9/14 (failed to pay one month and fine of R5000 imposed); ET/C/18/14 (failed to pay one month because the government had not paid for the goods it supplied).

197 ET/183/12.

198 ET/183/12.

199 ET/183/12. See also ET/127/15.

200 ET/C/2/2015; ET/C/2/20; ET/C/14/21; ET/C/04/14; ET/C/26/14; ET/C/09/13 . ET/C/03/16; ET/C/04/16 (case dismissed); ET/C/4/21.

upon prosecution, the proof was submitted that the salaries had been paid.²⁰¹ In another case, a company was prosecuted for failure to submit the record of payment of 17 non-Seychellois workers.²⁰² Proof of payment must be for the entire workforce.²⁰³ Thus, employers have been convicted for failure to produce copies of some of their workers' contracts of employment.²⁰⁴ This ensures that the competent officer and the Tribunal are able to monitor the extent to which employers are paying their workers irrespective of their nationality. In another case, an employer pleaded guilty to the offence of failing to submit copies of the contract of employment for their non-Seychellois worker.²⁰⁵ The practice is for the non-Seychellois workers to submit their complaints to the Ministry in writing informing it of their grievances and for the competent officer to require the employer to submit evidence disputing such allegations. Should he/she fail to submit that evidence, he/she will be prosecuted.

Under section 76(1)(d), it is an offence if any person, 'without reasonable excuse, fails to comply with any directions given by a competent officer or any conditions attached to any permit issued under this Act.' Section 63 of the Act provides that '[w]herever notice is required to be given under this Part, payment corresponding to the period of notice required or to such part of it as is not worked may be made in lieu.' There have been instances where pursuant to mediation, the competent officer has ordered employers or workers to make payment in lieu of notice to employers. However, some of the employers²⁰⁶ or workers have not made such payment and they have been prosecuted before the Tribunal under section 76(1)(d) and ordered to make payments.

There have been instances where a competent officer has ordered employers to pay their worker's employment benefits, especially salaries and those who have refused to do so have been prosecuted under section 76(1)(f). As a result of these prosecutions, employers have paid their salaries.²⁰⁷ The payments have been made in lump sum or in instalments.²⁰⁸ There have also been cases where employers have been prosecuted for

201 ET/C/12/13.

202 ET/C/11/12 (however, the case with withdrawn by the prosecution and the record is silent on the reason for the decision).

203 ET/C/14/13.

204 ET/C/10/14; ET/C/12/14; ET/C/4/20.

205 ET/C/6/2015 (the Tribunal imposed a fine).

206 ET/C/07/2009; ET/C/13/14; ET/C/4/09.

207 In these cases, the accused made payments and the cases were withdrawn/set aside: ET/C/13/10; ET/C/17/10; ET/C/31/2009; ET/C/32/2009; ET/C/36/2009; ET/C/35/2009; ET/C/36/2009; ET/C/37/2009; ET/C/29/2009; ET/C/30/2009; ET/C/20/2009; ET/C/01/2009; ET/C/05/2009; ET/C/10/13 and ET/C/7/2010. There are also cases in which employers have been convicted: ET/C/10/2010 (failure to pay salary—pleaded guilty and ordered to pay in instalments); ET/C/18/10 (private individual convicted of failure to pay salary under s 76(1)(g)).

208 ET/C/08/2009.

their failure to provide workers with certificates of employment²⁰⁹ and failure to provide written contracts of employment to workers.²¹⁰

Section 18(2)(a) of the Act provides that ‘[a]n employer who employs a non-Seychellois worker shall ensure that the contract of employment of the worker which shall be a fixed-term contract is attested by a competent officer.’ Under section 76(2)(a) of the Act, it is an offence for an employer to contravene section 18(2) of the Act. In one case, the employer—a juristic person—was convicted of contravening section 18(2)(a) of the Act and ordered to pay a fine. It argued in mitigation that it had used a recruitment agency to recruit the worker.²¹¹ An employer was also prosecuted for failing to submit to the Ministry of Employment copies of contracts of employment of non-Seychellois workers.²¹² These measures are meant to give effect to Articles 37 and 68 of the Convention which require Seychelles to ensure, inter alia, that the terms and conditions of migrant workers are spelt out in their contracts of employment.

An employer or worker convicted by the Tribunal has to pay a fine and in the event of refusal or failure to pay the imposed fine, the Tribunal will commit the offender to imprisonment.²¹³ An employer can only be convicted under section 76 if there is proof that he/she/it is the employer. The burden is on the prosecution to prove that indeed the accused is an employer. For example, managers of limited liability companies should not be sued in their individual capacities. It is the companies to be sued instead.²¹⁴ The accused also has the right to a fair trial. For example, the charge sheet must disclose the offence, otherwise, the case will be dismissed.²¹⁵ The discussion above has illustrated how the competent officers and the Tribunal have protected the rights of regular migrant workers. As mentioned above, the drafting history of the Convention shows that it is also applicable to irregular migrant workers. Although the Act does not include a provision on irregular migrant workers, the Convention imposes an obligation on Seychelles to protect their rights. It is to this issue that we return.

209 ET/C/02/13.

210 ET/C/20/14 (the company pleaded guilty and was convicted); ET/C/4/2015 (case withdrawn when a copy was given).

211 ET/C/12/21.

212 ET/C/03/14 (case withdrawn against the company without reason).

213 ET/C/4/11 (The company was convicted of an offence under s 76(5) and failed to pay a fine and one of its directors was committed to prison for one month. Before the director’s imprisonment, the company made payment.)

214 ET/C/22/13 (There was no evidence that the natural persons were the employers. The company was the employer).

215 ET/C/6/14 (The case was dismissed because the charge sheet did not disclose the offence under s76(1)(d)). See also ET/C/23/09; ET/C/41/09.

The Applicability of the Convention to Irregular Workers

Article 54(2) is silent on whether it is applicable to irregular migrant workers. In its General Comment on the Rights of Migrant Workers in an Irregular Situation and Members of their Families,²¹⁶ the Committee on Migrant Workers is silent on whether Article 54(2) is applicable to irregular workers. Despite this silence, it is argued, based on the drafting history and the text of the Convention, that Article 54(2) is applicable to irregular migrant workers. It should be remembered that Article 2(1) of the Convention defines a migrant worker to mean ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.’ The drafting history of Article 2(1) shows that countries suggested different definitions of the term ‘migrant worker.’ For example, the definition suggested by the delegations of Finland, Greece, Italy, Norway, Portugal, Spain and Sweden was silent irregular migrant workers.²¹⁷ Likewise, the definition suggested by the delegations of Algeria, Barbados, Egypt, Mexico, Pakistan, Turkey and Yugoslavia was silent on irregular migrant workers but stipulated that for one to be recognised as a migrant worker, he/she should be engaged in ‘lawful and remunerated’ activity.²¹⁸ However, some members of the working group on the draft Convention argued that the Convention should define a migrant to mean ‘any person who has been authorized by a State, other than that of which he is a citizen’ to take up employment or work in the country in question.²¹⁹ This definition would have specifically excluded irregular migrant workers. In support of this definition, the representative of Denmark argued that the definition of a ‘migrant worker’ in the Convention:

[S]hould be in line with article 1 on [the] definition of the European Convention on the Legal Status of Migrant Workers. She stressed that the proposal should not be interpreted to mean that Denmark did not recognize the human rights of illegal migrant workers. She felt that the definition in the European Convention was useful as it allowed State Parties to ratify certain parts of it while excluding others.²²⁰

This approach was supported by the representatives of Germany, the Netherlands and the United States who argued that ‘the principles set forth in the definition contained in the European Convention could serve as a useful basis for further consideration of the definitions.’²²¹ The United States argued further that ‘the definition should make it clear

216 Committee on Migrant Workers, The rights of migrant workers in an irregular situation and members of their families, General Comment No. 2, CMW/C/GC/2 (28 August 2013).

217 General Assembly, Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families A/C.3/39/1, (14 June 1984) para 98. See also the definition suggested by the United Arab Emirates, para 113.

218 Compilation of Proposals made by Members of the Open-Ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, based on documents of A/36/378, A/36/383 and A/C.3/36/WG.1/CRP.1, (A_C.3_36_WG.1_WP.1-EN) (16 October 1981) 14.

219 *ibid* 13.

220 General Assembly (n 218) para 102

221 *ibid* para 103.

that the scope of the Convention was limited to those lawfully admitted in the State of employment for the purpose of temporary employment.’²²² However, the delegations of Yugoslavia, Argentina, the Dominican Republic, Ghana and Mexico argued that they were opposed to any definition that ‘would exclude the protection of the human rights of undocumented migrant workers’ as the purpose of the Convention was for ‘the protection of all migrant workers and members of their families.’²²³ In other words, they were not prepared to accept a definition which ‘did not cover the protection of undocumented migrant workers or those who were in irregular or special categories ...’²²⁴ The definition suggested by the Indian delegate also extended to the protection of irregular migrant workers.²²⁵ The Working Group provisionally agreed on two definitions of a ‘migrant worker’, the first definition was silent on the issue of irregular workers and the second one expressly mentioned irregular workers.²²⁶ At the Working Group’s subsequent meeting which dealt with, *inter alia*, the definition of the term ‘migrant worker’, delegates from most countries argued that the Convention should protect the rights of all migrant workers irrespective of their status.²²⁷ Only one delegate argued that irregular workers should not enjoy the same rights as ‘lawful’ workers.²²⁸ The debates on the preamble of the Convention show that delegates wanted the Convention to protect irregular migrant workers as much as possible.²²⁹ At a later meeting, Denmark and other countries withdrew their proposal that the definition of a ‘migrate worker’ should exclude irregular migrant workers—as was in the case in the European Convention on the Legal Status of Migrant Workers.²³⁰ All the subsequent definitions that were proposed did not suggest that the Convention was not applicable to irregular migrant workers.²³¹ It is also reported that ‘several delegations’ argued specifically that the definition of a ‘migrate worker’ should not include any term/word that could be invoked by State parties to discriminate against irregular—undocumented—migrant workers.²³² Against that background, on 11 June 1985,²³³ the Working Group adopted the definition of a ‘migrant worker’ which was included in the Convention as Article 2(1) without any changes. Likewise, the drafting history of

222 *ibid* para 105.

223 *ibid* para 106.

224 *ibid* para 103.

225 *ibid* para 111.

226 *ibid* para 119

227 Report of the open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, A/C.3/40/1 (20 June 1985) paras 29–30 (Denmark and Norway); para 43 (Algeria) and para 59 (France).

228 *ibid* para 34 (India)

229 *ibid* paras 105, 107–117.

230 *ibid* paras 140–141.

231 *ibid* paras 142–155.

232 *ibid* paras 156–172.

233 *ibid* para 173.

Article 1 of the Convention shows that the majority of the delegates were of the view that the Convention is applicable to both regular and irregular migrant workers.²³⁴

Conclusion

In this article, the author has illustrated how competent officers and the Tribunal have dealt with the grievances of non-Seychellois workers. It has been illustrated that the grievance procedure substantially complies with Article 54(2) of the Convention. The author has also suggested possible areas of improvement. It is argued, based on the drafting history of the Convention, that Article 54(2) of the Convention is applicable to both irregular and regular migrant workers. This means that should an irregular migrant worker approach the competent officer or the Tribunal, he/she should be equally protected. Although, as discussed above, there are still some issues that still need to be addressed to better protect the rights of migrant workers, Seychelles should be applauded for measures it has put in place to protect the rights of migrant workers. In some countries, such measures do not exist, and migrant workers have to lay their complaints before their respective consulates or embassies.²³⁵

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