Rouben Mooroongapillay
CHAMBERS

RETHINKING EMPLOYMENT REGIME UNDER MAURITIAN LAW

PROPOSALS FOR LEGISLATIVE REFORM

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ROUBEN MOOROONGAPILLAY
Barrister-at-Law
RM CHAMBERS

rouben@rm-chambers.com
mooroongapillay@hotmail.com

www.rm-chambers.com

FOREWORD

This Proposal has been drafted in the context of a public invitation by the Ministry of Labour and Industrial Relations of the Republic of Mauritius to submit proposals or suggestions aimed at reviewing the challenges (legislative, institutional and administrative) in the world of work and to identify solutions or measures (including legislative amendments) to address these challenges.

This endeavour is a welcome divergence from the practices of the recent past which consisted of bringing about important legislative overhauls without any prior consultation with the relevant stakeholders and users of the system, thus overlooking the role of social dialogue in fostering social peace, stability and effective labour market governance[1].

As a result of laws adopted without tripartite consultations, our laws currently create rights or impose obligations which do not adequately cater for the actual needs of the workforce and are impractical to deploy for any reasonable employer. Given the time allocated for input, it has not been possible for me to survey and address all the legislative, institutional and administrative issues with the whole suite of legislation which applies to the subject of employment in Mauritius including (without being exhaustive) the Constitution, the Workers' Rights Act, the Employment Relations Act, the End of Year Gratuity Act, the Occupational Safety and Health Act, the Workmen's Compensation Act, the Non-Citizens (Employment Restriction) Act, the Additional Remuneration Act, the Industrial Court Act, the Equal Opportunities Act, the Data Protection Act, the Social Contribution and Social Benefits Act, among others.

I have no doubt that, with the contribution of other stakeholders, the main shortcomings would probably be addressed and will allow for a comprehensive review of the entire employment law regime under Mauritian law.

Les Assizes du Droit du Travail et de l'Emploi will undoubtedly offer an opportunity to engage in constructive exchanges with the overarching aim of bringing the law in line with the exigencies of the modern workplace. Such is my hope and the aim of my contribution.

Yours for Justice,

Rouben Mooroongapillay

RM Chambers

[1] Social dialogue's role in achieving the Sustainable Development Goals, https://www.ilo.org/topics-and-sectors/social-dialogue-and-tripartism

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1. Catering for cross-border situations

1. Much like the rest of the world, the contemporary workplace is constrained by physical or geographical borders. It is increasingly common for employees to be retained to work for one jurisdiction whilst being based in another jurisdiction, for a wide array of reasons, including in the context of business process outsourcing. We may, therefore, be faced with the following non-exhaustive situations:

    1.1. An employee working physically from Mauritius for a foreign employer, and doing work related to the Mauritian territory (e.g. servicing Mauritian clients);

    1.2. An employee working physically from Mauritius for a foreign employer, with the entire substance of the work situated outside Mauritius, including pursuant to various schemes promoted by the Economic Development Board;

    1.3. An employee working physically from outside Mauritius for a Mauritian employer and servicing Mauritian clients/doing work related to the Mauritian business of the employer;

    1.4. An employee working physically from outside Mauritius for a Mauritian employer and doing work which is not connected to Mauritius.

2. These situations which are characterized by an element of extraneity inevitably raise private international law concerns, such as:

    2.1. The competent forum to adjudicate any employment dispute, including, but not limited to situations of unfair dismissal or redundancy;

    2.2. The law applicable to the contract of employment, in particular, whether the mandatory provisions of the Mauritian employment law regime can impose itself in such constellations.

A. Jurisdiction of Mauritian courts for employment disputes with cross-border elements

3. From the competent forum perspective, the issue may, at first, seem easy to resolve, as articles 19[2] and 20[3] of the Code Civil provide for the competence of Mauritian courts in case where either the Plaintiff or the Defendant is Mauritian.

4. However, reliance on these provisions does not offer adequate protection to the employee who seeks recourse before the Mauritian courts for the following reasons:

   4.1. Firstly, the ordinary bases for jurisdiction of the Mauritian courts may be objected to on grounds of *forum non conveniens*, where an employer contends that there is another court of competent jurisdiction where the matter may be heard in the interests of all those involved and for the ends of justice. Upholding an objection of *forum non conveniens* is a matter of the court's discretion, and therefore injects a considerable measure of uncertainty in the process, which is incompatible with the vulnerable situation of an employee;

   4.2. Secondly, because these bases for jurisdiction are ordinary (as opposed to special) bases of jurisdiction and are not d'*ordre public*, they may be ousted by a choice of court provision, as has been confirmed by our courts in the case of *El Maliki v Compagnie des Hypermarchés*[4] [2001 SCJ 2]. This leave the scope for abuses by employers, who may seek to deny to the employee a real chance of prosecuting a meritorious case for unfair termination, for instance, by imposing a choice of court clause in a jurisdiction which is not easily accessible to the employee. The ordinary French principles of private international law and our Code Civil do not offer the flexibility to a judge to disapply such abusive provisions;

   4.3. Thirdly, a migrant employee who seeks to enter proceedings against an employer in Mauritius may currently be compelled, under article 21 of the Code Civil and following a motion from the employer, to provide security for costs before proceeding with his

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[2] Article 19 of the Code Civil provides that: « *L'étranger, même non-résident à Maurice, pourra être cité devant les tribunaux mauriciens, pour l'exécution des obligations par lui contractées à Maurice avec un Mauricien; il pourra être traduit devant les tribunaux de Maurice, pour les obligations par lui contractées en pays étranger envers les Mauriciens.* »

[3] Article 20 of the Code Civil provides that: « *Un Mauricien pourra être traduit devant un tribunal de Maurice, pour des obligations par lui contractées en pays étranger, même avec un étranger.* »

[4] The relevant quote reads as follows: « *la disposition de l'art. 14 n'est pas d'ordre public; elle constitue en faveur des nationaux un privilège de juridiction auquel ils sont toujours libres de renoncer, expressément ou tacitement; toutefois, une telle renonciation ne saurait se présumer ; elle doit être certaine, bien qu'elle puisse être tacite, c'est à dire qu'elle doit résulter des faits qui la manifestent.* »

case, which represents a procedural hurdle which is, yet again, not compatible with the vulnerable status of an employee;

4.4. Fourthly, articles 19 and 20 of the Mauritian Code Civil, which are based on articles 14 and 15 of the French Code Civil, are notoriously viewed as exorbitant grounds for jurisdiction, which implies that any judgment delivered by the Mauritian courts on the basis of these jurisdictional grounds only may be refused *exequatur* outside Mauritius, which further weakens the position of an employee who opts to bring a case in Mauritius against a foreign employer when no other connecting factors exist.

5. In light of the foregoing, it is imperative, given the evolving nature of cross-border employment and their increasing prevalence with a link to Mauritius (employer of record based in Mauritius, for instance), to define the rules for the Mauritian courts to have competence to hear employment law disputes involving a Mauritian employer, a Mauritian employee or work performed on the Mauritian territory.

6. Under the *Brussels I Regulation (Recast)* which deals with jurisdiction in civil and commercial matters within the European Union, it is recognized that employees are weaker parties who ought to be protected by rules of jurisdiction more favourable to their interests than general rules[5]. The Regulation provides for limits to the freedom of the parties to choose the competent court to determine their disputes.

7. A related question which also remains largely unresolved under our laws is the validity of arbitration clauses in contracts of employment and the related question of whether labour disputes are arbitrable. In line with the approach which is prevalent outside Mauritius, it is suggested that disputes other than those arising out of mandatory provisions of employment law ought to be arbitrable. A proposal is made to that effect below

8. Based on the provisions of Articles 20 to 23 of the *Brussels I Regulation (Recast)*, the following provision is being suggested for inclusion in any principal legislation regulating the employer-employee relationship (currently the Workers' Rights Act), with cross-references in other labour law instruments to cater for the jurisdiction of Mauritian courts:

9. **Proposal for Legislative Reform/Amendment 1**

Jurisdiction of Mauritian Courts

(1) Notwithstanding any provision to the contrary, any clause contained in an agreement between an employer and a worker which purports to identify a competent jurisdiction

[5] Para 19 of the Recitals to the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

for resolving disputes arising out of or in connection with the employment relationship between that employer and its worker shall be construed as a non-exclusive jurisdiction clause for the benefit of the worker only.

(2) In addition to any choice of court clause in an agreement between an employer and a worker, the worker may bring proceedings against the employer in Mauritius where:

(a) The employer is established in Mauritius; or

(b) The worker habitually carries out his work in Mauritius; or

(c) If the worker does not or did not habitually carry out his work in any one country, if the business for which the worker was engaged is situated in Mauritius.

(3) An employer may bring proceedings against a worker in Mauritius only if the worker is domiciled in Mauritius.

(4) The jurisdictional bases provided for in this section are d'ordre public and no worker shall be deemed to have submitted to the jurisdiction of the courts of Mauritius unless the courts of Mauritius were competent to hear a dispute under this section.

(5) For the purposes of this section:

(a) an employer is deemed to be established in Mauritius where it is:

(i) a natural person habitually resident in Mauritius;

(ii) a body corporate incorporated or registered in Mauritius; or

(iii) it is not incorporated in Mauritius, but has a branch, agency or other establishment in Mauritius and the dispute relates to that branch, agency or other establishment.

(b) an employee is domiciled in Mauritius where, at the time when proceedings against him are initiated by the employer:

(i) being a national of Mauritius, he is habitually resident in Mauritius;

(ii) being a foreign national, he holds a permanent resident permit, a work permit, an occupation permit or any relevant permit or authorization allowing him to live in Mauritius.

(6) Notwithstanding any provision to the contrary under any other enactment, worker who institutes proceedings before the courts in Mauritius against an employer shall not be required to deposit any security for costs to proceed with his action even where the worker is a foreign national.

(7) The provisions of the Courts (Civil Procedure) Act shall not, in so far as it relates to leave to enter proceedings against absent defendants, apply to any action instituted by a worker against an employer and in respect of which the courts of Mauritius have jurisdiction pursuant to this section[6]. Leave shall however be required to serve process outside Mauritius.

(8) Nothing in this section shall be interpreted or construed as precluding the worker and the employer from agreeing to submit disputes arising out of or in connection with their agreement to arbitration, provided however that:

(a) for any matter which falls under the scope of the Industrial Courts Act, the worker shall have a choice between arbitration and the jurisdiction of the Industrial Court;

(b) any matter falling under the powers of the Redundancy Board shall necessarily be submitted to the Redundancy Board, to the exclusion of arbitration.

B. Determining the scope of application of Mauritian employment law

10. Whilst the issue of the competent forum and the jurisdiction of Mauritian courts could partly be resolved (albeit with solutions which are open to criticism) under the Mauritian Code Civil , the question of the situations to which the Mauritian employment law regime applies is more complex and our legislative provisions of general application do not provide a clear-cut answer, with the result that the issue remains to be determined by applying principles of Mauritian private international law which are themselves inspired from the equivalent French principles before harmonization of the private international law regime in Europe.

11. Following the old French private international law principles, a contract with cross-border elements would be governed by the law of the place which is most closely connected to the "*économie de la convention et les circonstances de la cause*"[7], which is, in turn, determined by the in the context of a contract of employment, the *économie de la convention and circonstances de la cause* would be related to the place where the employee is required to perform work[8]. In the context of remote work, with the emergence of virtual roles such as virtual secretaries and with business process outsourcing which may result in employees working in one physical place offering services across the globe, the test of "*économie de la*

[6] This is consistent with the approach taken in divorce cases where the existence of special grounds of jurisdiction implies the non-applicability of the general regime of leave to enter proceedings – *Ramboccus v Ramboccus* [1982 MR 19]

[7] *Societe des Fourrures Renel c Allouche* – Cour de Cassation, Ch civ, 1er sect, 6 Juillet 1959

[8] Soc. 31 mars 1978, Royal Air Maroc, Rev, crit. 1978. 703 – « *le contrat de travail est en principe régi par la loi du lieu d'exécution de celui-ci, laquelle ne peut être écartée qu'au profit d'un loi plus favorable au salarie* », referred to at para 36.8, Grands Arrêts de la Jurisprudence Française de droit international privé

convention et les circonstances de la cause" can give rise to more issues than it is capable of solving.

12. For instance, does the mandatory regime for termination of employment apply in all circumstances where the employer is Mauritian, irrespective of whether or not the employee is working in Mauritius? What about the end of year bonus/end of year gratuity? Is it applicable if the employee is working from Mauritius, irrespective of the nationality of the employer? In other words, what level of connection is required to the Mauritian jurisdiction for its mandatory rules to impose themselves on the employer-employee relationship? Framed differently, what is the level of connection required to the Mauritian jurisdiction for the Mauritian parliament to have a legitimate interest in regulating that relationship? Do the parties enjoy full autonomy to exclude the application of Mauritian law through a choice of law clause, as was suggested in the case of *El Maliki v Compagnie des Hypermarchés* (supra)?

13. The obscure principles of French Private International Law, and the absence of any judgment on the issue of determination of the applicable law in the employment context introduces a considerable measure of uncertainty in the employer-employee relationship which is incompatible with imperative of protecting employees adequately.

14. The prevalence of cross-border employment situations necessarily implies that it is only a question of time before the issue of applicable law is raised before our courts. It is suggested that, before this situation arises, it is urgent that the legislature defines the scope of application of the Mauritian employment regime in clear terms to dispel any uncertainty and to provide a conflict of laws rule for other cases which do not fall under the scope of the Mauritian regime.

15. It is therefore proposed that the approach adopted in the European Union, under the Rome I Regulation, be followed in Mauritius as well, to define the scope of application of our suite of laws. Subsection (2) below caters for temporary assignments outside the jurisdiction where the employee habitually performs work, including secondments to related companies outside Mauritius for a fixed duration:

16. **Proposal for Legislative Reform/Amendment 2**

Option 1

(1) The agreement between a worker and the employer shall be governed by the law chosen by the parties, provided however that such choice of law may not have the result of depriving the employee of the protection afforded to him by the provisions that cannot be derogated from by agreement under the law which, in the absence of choice, would have been applicable pursuant to subsections (2), (3) and (4) below.

(2) In the absence of choice, the agreement between a worker and the employer shall be governed by the law of the country in which, or failing that, from which the employee habitually carries out his work in performance of the agreement, at the instruction of the employer. The country where work is habitually carried out shall not be deemed to have changed if the worker is temporarily employed in another country by the same employer or with the approval of the employer.

(3) Where the law applicable cannot be determined pursuant to subsection 2, the contract shall be governed by the law of the country where the place of business through which the worker was engaged is situated.

(4) Where it appears from the circumstances as a whole that the agreement is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

OR

Option 2

(1) This Act shall apply to an agreement between a worker and the employer where:

(a) The worker is habitually required by the employer to carry out his duties in Mauritius; or

(b) The worker is habitually required by the employer to carry out his duties from Mauritius; or

(c) Failing an identifiable place in accordance with paragraphs (a) and (b) above, where the employer through which the worker was engaged has its place of business in Mauritius.

(2) It shall however be possible to apply a different law where it appears from the circumstances as a whole that the agreement is more closely connected with a country other than that indicated in subsection (1) above.

17. From a private international law perspective, Option 2 follows a unilateral methodology, by which the Mauritian Parliament would unilaterally decide when its laws would apply, ignoring the existence of any other laws which may have an interest in their laws being applied. This shortcoming is taken care of in subsection (2) of the Option 2, but Option 2 still does not offer a solution where the criteria in subsection (1) of Option 2 are not satisfied. By contrast, Option 1 adopts a multilateral approach, by identifying which connecting factors the court will consider, in which case the court will apply any domestic law whose application is designated by application of this provision. For this reason, Option 1 is preferred.

18. The hallmark of any legislation is its ability to cater for evolving realities of the situation it attempts to regulate and the issue of cross-border employment has, for far too long, been ignored in our laws. It is sincerely hoped that this will change.

2. Pre-Employment Considerations

A. Guaranteeing employee's freedom to move from employer to employer and framing restrictive covenants

19. The freedom of an employee to choose his employer and to change employment is implied in the fact that the employee is, contrarily to the employer, not required to give reasons to resign from employment and is normally only subject to the notice period which is contractually stipulated.

20. Two issues arise due to the implied nature of this protection:

20.1. When an employer happens to find out that an employee has exercised his freedom to prospect employment opportunities elsewhere (frequently at a competitor's place), there may be indirect discrimination or retaliation against the employee. This situation does not fall under the scope of the Equal Opportunities Act as the grounds for discrimination is not related to any aspect of "status" as defined in that enactment. Whilst the acts of the discriminating employer may amount to violence at work, it would still have to be categorized as one of the prohibited acts for the purpose of section 114 of the Workers' Rights Act which precludes harassment (sexual or otherwise), assault, abuse, insult or humiliation, expression of intention to cause harm, bullying or use of aggressive gesture indicating intimidation, contempt or disdain or hindrance by words or act;

20.2. The use of restrictive covenants which preclude an employee from taking up employment with a competitor is often abused by the employer. There is currently diverging caselaw on the requirement for a *contre-partie financière* as a condition for validity of such clauses. Although the cases which advocate against such *contre-partie financière* contend that this requirement arises from an express provision of French law which has not been reproduced under Mauritian law by Parliament, this rationale is flawed as the *contre-partie financière* is **NOT** provided under the French Code du Travail; such requirement arises under caselaw of the French courts. The issue under French law is that there is no guidance on the quantum of this *contre-partie financière*, with the result that it may lead to protracted litigation which may jeopardise the legitimate interests of the worker, especially where an interim injunction is issued to enforce the restrictive covenant.

21. It is therefore proposed that the employee's freedom to prospect potential vacancies and to move from one employer to another should be given express protection and the conditions for validity of restrictive covenants should be provided for under our laws.

22. **Proposal for Legislative Reform/Amendment 3**

(1) A worker shall be free to prospect job opportunities, whether within the employer's organization, or elsewhere, and where the worker exercises his right to do so, he shall not be subject to any discriminatory treatment at his current place of work by any person.

(2) For the purposes of subsection (1) above, discrimination shall have the same meaning ascribed to it under the Equal Opportunities Act.

(3) Any person who breaches subsection (1) above shall commit an offence and shall, upon conviction, be liable to pay a fine not exceeding 100, 000 rupees and to imprisonment for a period not exceeding 1 month.

(4) No employer shall subject any worker to any restrictive covenant limiting the worker's liability to take up employment after his termination, however arising, unless the restrictive covenant:

(a) is in writing;

(b) is limited in time and space, having regard to the legitimate business interests of the employer;

(c) is in relation to a specific activity to be undertaken by the worker at an undertaking which is competing with those of the employer;

(d) provides for the payment of a compensation which shall be at least equivalent to 25 per cent of the remuneration which the worker would have earned for the period of the restriction, had he remained in employment with the employer seeking to enforce the restrictive covenant.

(5) Nothing in subsection (4) shall be interpreted as limiting the ability of the employer to include restrictive covenants in relation to solicitation of employees, suppliers, clients, business or other stakeholders.

B. Enforcing Equality of Opportunities guarantees

23. Whilst Mauritius has enacted legislation to prevent discrimination at the pre-employment stage, by precluding employers and prospective employers from discriminating against persons in the advertisement of a job, in determining who should be offered employment or

in refusing or deliberately omitting to offer employment to a person, there is no mechanism in place to enforce these provisions.

24. Section 9 of the Equal Opportunities Act currently provides for employers to adopt equal opportunity policies with the view to minimize the risk of an employee being discriminated against and to promote recruitment, training, selection and employment on the basis of merit[9], but there is no requirement for this policy to be submitted for records to any agency.

25. Additionally, the protection granted under the Equal Opportunities Act is currently enforced as follows:

    25.1. A person alleging that his rights under the Equal Opportunities Act have been infringed may lodge a written complaint with the Equal Opportunities Commission (EOC) setting out the details of the alleged act of discrimination – section 28(1);

    25.2. The EOC then investigates into the complaint if the complaint appears to be well-founded;

    25.3. The EOC may then require the employer to disclose information regarding any equal opportunity policy adopted by them and may require any person to furnish information;

    25.4. The EOC may then either suggest that no further action be taken, or attempt to conciliate between the parties, or complete its investigation and submit a report, with recommendations, to the parties;

    25.5. If the complaint remains unresolved after the report, it is referred to the Equal Opportunities Tribunal with the consent of the complainant;

    25.6. The Employment Relations Tribunal is precluded from hearing and determining a complaint under the Equal Opportunities Act unless the complainant has voluntarily made a sworn statement, in such form as may be prescribed, that he has waived his right to initiate civil proceedings before any Court in Mauritius in respect of the facts that form the subject matter of the complaint. This waiver acts as a bar to subsequent civil proceedings being initiated by the complainant before any Court in Mauritius in respect of the subject matter of the complaint – section 35(5) of the Equal Opportunities Act;

[9] Please note that, in the web version of the Equal Opportunities Act, accessible from the website of the Supreme Court, there is a comma missing in subsection 9(1) between the terms “recruitment: and “training”. No independent verification has been made as to the Gazetted version of the law.

25.7. Any compensation which may be ordered by the Equal Opportunities Tribunal may not exceed MUR 500, 000 – sections 35(1)(c)(ii) and 35(3)(a).

26. The limitation on the quantum of permissible compensation under sections 35(1) and 35(3) of the Equal Opportunities Act is potentially problematic. Where a worker is treated in a way which is discriminatory, for instance, in relation to terms and conditions of employment, including remuneration, that worker should, if his complaint is found to be justified, be entitled to recover any short-pay which may have resulted from his discriminatory treatment by virtue of an order of the EOC, especially since that complainant is, by virtue of section 35(5) of the Equal Opportunities Act, precluded from prosecuting civil proceedings before any other forum. There appears to be no justification why the powers of the Equal Opportunities Tribunal is limited to MUR 500, 000 for compensation. It may be the case that the compensation being referred to does not include any back pay, but only moral damages suffered by the complainant, in which case the powers of the Tribunal should be extended to order any back pay, without any limitation on the quantum which may be ordered, as this is not specifically catered for if the term "compensation" ought to be interpreted as "moral damages".

27. **Proposal for Legislative Reform/Amendment 4**

Option 1

Amending section 35(1)(c)(ii) of the Equal Opportunities Act by deleting the words "compensation in an amount not exceeding 500, 000 rupees" and replacing them by the words: "such compensation as may be justified in the circumstances of the case", and a corresponding amendment to section 35(3)(a) of the Equal Opportunities Act;

Option 2

Amending section 35(1)(c)(ii) of the Equal Opportunities Act by adding, after the words "compensation in an amount not exceeding 500, 000 rupees" the words "together with such shortfall in payment of any remuneration owed to the complainant as a result of his discriminatory treatment".

In case this Option is preferred, then section 35(3)(a) may not be amended, unless the policy makers believe that the quantum of compensation which may be ordered by the Equal Opportunities Tribunal should be increased.

28. Secondly, the Equal Opportunities Act does not provide for a reversal of the burden of proof (except, pursuant to sections 10(2) and 11(2) of the Equal Opportunities Act, in the case where the employer asks for criminal records to be produced by employees/prospective

employees). As such, it is assumed that the burden lies with the complainant to prove his case before the Equal Opportunities Tribunal.

29. By maintaining the onus on an aggrieved applicant for a vacancy to prove that the reason for him/her not being retained was due to discrimination on one of the grounds prohibited under the Equal Opportunities Act, the law does not provide a strong control mechanism, especially since the aggrieved person may not have access to proof of such discrimination, such as the curriculum vitae of other applicants, recruitment patterns and similar information for vacancies in the private sector.

30. In order to enhance the enforcement of the equal opportunities obligations of employers under the Equal Opportunities Act, it is proposed that a reporting obligation be introduced, in line with the measures implemented in the European Union in 2023[10].

31. We acknowledge that requiring an employee or prospective employee to provide information on his caste, colour, creed, ethnic origin, place of origin, political opinion, race, sex or sexual orientation may not be in compliance with the data minimization principle underlying the Data Protection Act, which requires that personal data which is collected is limited to what is necessary in relation to the purpose for which they are processed[11]. As such, the proposal for reporting is being limited to gender, age, marital status and impairment.

32. It is up to the Mauritian Parliament to consider whether the collection of data relating to the other aspects of "status" as defined under the Equal Opportunities Act ought to be integrated into the reporting mechanism, in which case it is proposed that a voluntary disclosure principle be implemented, allowing employees to disclose such information only if they wish to. Should this be proceeded with, it is suggested that political opinion be excluded from the scheme.

33. This measure ought also be coupled with a provision on pay transparency, to enhance the effectiveness of recruitment exercises and to enable potential applicants to properly consider whether the post and the terms and conditions of employment match their expectations.

[10] Directive (EU) 2023/970 of the European Parliament and the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms

[11] Section 21(c) of the Data Protection Act

34. **Proposed Legislative Reform/Amendment 5**

Amending the Equal Opportunities Act by adding section 10A

(1) Applicants for employment shall have the right to receive, from the prospective employer, information about:

(i) The initial pay or its range, based on objective, status-neutral criteria, to be attributed for the position concerned;

(ii) Where relevant, the relevant provisions of the collective agreement applied by the employer in relation to the position.

(2) Such information shall be provided in a manner such as to ensure an informed and transparent negotiation on pay, such as in published job vacancy, prior to the job interview, or otherwise.

(3) Employers shall make easily accessible to their workers the criteria that are used to determine workers' pay, pay levels and pay progression. Those criteria shall be objective and gender neutral.

(4) Employers employing more than 250 employees shall, on an annual basis, provide the following information to the Equal Opportunities Commission:

(a) The gender pay gap;

(b) The median gender pay gap;

(c) The proportion of female and made workers in each quartile pay band;

(d) The proportion of workers for each age band – 18 to 30, 30 to 40, 40 to 50 and 50 to 65;

(e) The number of workers having an impairment;

(f) The proportion of workers per marital status – single, married, divorced;

(g) For each publicized vacancy, the number of applicants per age band, marital status, and impairment and the age band, marital status and impairment of the applicants who are offered the post.

(h) ***OPTIONAL*** *where such information is available, a breakdown of the workforce in terms of percentage by caste, colour, creed, ethnic origin, place of origin, race, sex or sexual orientation, provided however that no employer shall compel its worker to disclose such information and where such information is voluntarily provided by a worker, it shall be on an anonymous basis and shall be destroyed*

as soon as the information is processed to allow for the breakdown by caste, colour, creed, ethnic origin, place of origin, race, sex or sexual orientation.

35. It is further proposed that the Ministry explores the institution of an **Equal Opportunities Rating**, which would be mandatory for public companies as well as companies listed on the stock exchange of Mauritius, based on the information provided to the Equal Opportunities Commission on an annual basis.

36. **In order to introduce an ESG component in the public sector, it is further suggested that, for some important public procurement exercises, eligibility of potential bidders to submit tenders for public procurement exercises be limited to companies having a minimum Equal Opportunities rating.** No proposal for legislative reform is being made at this stage for this aspect, as it would be more appropriate for this proposal to be integrated as part of the guidelines issued by the Procurement Policy Office and be considered for individual procurement exercises as part of the bid specifications or bidder eligibility criteria.

3. Starting the employment relationship - Probation Periods

37. Probation periods are not specifically legislated upon under our laws. In cases where probations periods have been included in contracts of employment, our courts have resorted to the principles set out in French cases to determine their validity and their effect.

38. The following extract from the case of *Bhadain v ICAC* [2005 SCJ 132] is of particular relevance in understanding how a properly drafted probation period ought to be treated:

> *"A "contrat à l'essai," admittedly, is an initial phase in an employment contract where both parties may agree that they may terminate the contract, without notice, without compensation and without formulating any reason for it –*
>
> *"Les parties peuvent prévoir, dans le contract à durée determinée, l'existence d'une période d'essai. Son régime demeure celui du droit commun: les contractants peuvent rompre unilatéralement, à tout moment, cette période initiale du contrat, sans préavis ni indemnité, et sans avoir à donner les motifs de leur décision...» Répertoire Trav. Dalloz , décembre 2002, paragraphe 250.*
>
> *We have no difficulty in following Mr d'Unienville that if a "contrat a l'essai" may be inserted independently of our Labour Act, it could likewise be inserted independent of POCA. In fact, a "contrat à l'essai" is a creature not of legislation but of judges. It is not found in our civil code."*

39. Admittedly, after this judgment was delivered, the provision of our labour legislation regarding notice for termination was amended and whilst under the Labour Act, the provision

on notice for termination was "subject to any agreement to the contrary", under the Workers' Rights Act, this provision now applies "notwithstanding any agreement to the contrary".

40. However, if the above extract from the case of *Bhadain v ICAC* is followed, then it would seem that the probation period strictly speaking falls entirely outside the scope of the WRA and would therefore not be deemed to constitute an "agreement" governed by the WRA. As such, the notice requirement would not impose itself during the probation period.

41. The other issue which remains unresolved is whether the notice period, if applicable, would still be required if the employee is not to be confirmed in his post at the end of the probationary period or whether the probationary period is, in fact, a fixed term contract which lapses ipso facto upon its term being reached, unless the employee is confirmed in his post.

42. It is readily acknowledged that an employer has a legitimate interest in ascertaining the suitability of a new recruit to the exigencies of its business and operations, as well as his adaptability to the company's environment and culture, including his rapport with existing employees. Conversely, an employee needs to have visibility on his continued employment. How do we deal with the case where the employer actively poaches the employee from his immediately preceding employer, offering alluring joining bonuses and enticing them to leave the stability of a confirmed post? Is a probation period justified in these circumstances? Would a rigorous selection process water down the need for a probation period?

43. To address these competing interests and to eliminate any residual uncertainty, it is submitted that a reform ought necessarily to address the issue of probation periods, including the maximum duration of probation periods and the obligation of employers in terms of pre-screening, and candidate selection as well as their duty to offer the best opportunity to their new recruits to integrate their new working ecosystem.

44. **Proposed Legislative Reform/Amendment 6**

(1) An employer may provide for an initial probationary period to be included in writing in the agreement between the employer and the employee for the purpose of ascertaining the suitability of a newly recruited employee to the exigencies of its business and operations, as well as his adaptability to the employer's environment and culture.

(2) A period of probation shall not exceed a maximum of nine months in aggregate. Where a worker is maintained in his post after the expiry of nine months of probation or such shorter period as may be agreed in writing, the worker shall be deemed to have been confirmed in his post.

(3) During the probation period, either the employer or the employee may terminate the agreement by providing to the other a notice of not less than one week, unless the worker is terminated for gross misconduct[12].

(4) The employer shall provide reasons for the worker's termination during the probationary period.

(5) During the period of probation, the employer shall provide all requisite training and assistance to enable the worker to integrate the workplace and to perform his duties to the required standard. Where the worker's probation is terminated without such training and assistance being provided, the worker shall be entitled to three months' remuneration as compensation.

(6) Whilst an employer and a worker may agree for a probationary period to be included in the agreement at the time when the worker is promoted from his existing post to another post, the employer shall not terminate the worker's employment in the event that the worker fails to perform in the promoted role, but shall instead be reverted to the post which he held immediately before the promotion.

45. The above proposal does not address the situation where the employer actively poaches an employee from its previous employer. We have not come across any legislation in countries we normally refer to which covers this aspect. It is therefore suggested that this scenario be left for a breach of contract claim.

4. Issues and inconsistencies with Workers' Rights Act

46. For want of time, in this section, we are merely highlighting certain issues with the provisions of the Workers' Rights Act (WRA) providing different entitlements to workers and it is hoped that these issues would be discussed in greater depth during the Assizes:

Provision of the WRA	Issues	Proposed Legislative Reform/Amendment 7
Section 5 - Discrimination	Section 5(5)(b) – discrimination between workers of a subsidiary company performing work of equal value as a worker employed by another subsidiary company of the parent company or the parent company, operating in the same line of business, on less favourable salary, terms and conditions of employment	Section 5(5)(b) should be limited to parent and subsidiaries established in Mauritius

[12] This proposal follows the scheme existing under English law.

	Issue: Not limited to parent and subsidiaries established in Mauritius and may therefore be problematic where the laws of different countries provide for different benefits or minimum salaries and different tax rates and cost of life.	
Section 12 – Deeming Agreements	Treats as an agreement governed by the WRA a situation where a worker is required to report at a place of work and is found fit and willing to perform the work for which he is required to report. Definition too wide and does not cater for the *lien de subordination* and payment of remuneration which are also essential components of the work agreement.	To add under section 12, the following subsections: (c) is remunerated for the work performed; (d) is subject to the direction and supervision of the employer.
Section 16(3A)	Possibility to deduct, from the amount payable under the compromise agreement the contribution payable to the PRGF.	It is submitted that there is no rationale to allow such deduction, inasmuch as pensions are in the nature of deferred pay and the employee's right to the pension corresponding to the time that he has worked has already accrued to him and may not be taken away from him – see below explanation on pension regimes.
Section 17 – atypical work agreement	The whole scheme is confusing and difficult to apply.	To align with modern English provisions on atypical work agreements.
Section 17A – Work from Home	The allowance payable in cases where the employee is required to work unsocial hours only applies where the employee works from home.	Extension of the allowance to all cases where employees are required to work during unsocial hours, whether from home or from the office.
Section 19(a)(c) – interruption of	Whilst the law provides that the continuous employment shall not be	To clarify the fate of an employee detained for an

continuous employment as a result of detention by police pending enquiry	interrupted if the employee is detained for a police enquiry and is released before a period of 60 days, the law does not specify what happens in practice if detention exceeds 60 days – is the agreement deemed to be terminated by the employee or does his years of service stop to be computed but he remains in employment? In addition, the correlation between this and the provisions on abandonment of work is not clear. If the employee is detained for enquiry, his absence is not without good and sufficient cause as required by section 61(3) of the WRA, especially since the employee benefits from a presumption of innocence under the Constitution.	enquiry and presumed to be innocent – impact on continuous employment and interplay with provisions on abandonment of work.
Section 24(1)(b) and (2) of the WRA - Overtime	The required notice from the employer requiring a worker to perform overtime is at least 24 hours and the notice for a worker to refuse to work overtime is also 24 hours. There is a mismatch between these time frames.	It is suggested that this provision be amended so that the employer be required to provide notice of at least 48 hours before requiring a worker to perform overtime, unless the circumstances justify otherwise, such as unplanned absences resulting in shortage of manpower.
Section 24(4A)(a)	Provides for the possibility for a worker to opt to be granted paid time off in lieu of remuneration. No provision for any unclaimed time off to be paid at the time of termination.	Section 31 to be amended to include an obligation to pay to the employee any unclaimed paid time off remaining on his account at the time of termination, however arising, including in the event of gross misconduct, as this is an element of pay which has already accrued to the employee, like accumulated leaves under section 45 of the WRA.

Section 30 – Payment of remuneration for work performed on public holiday	The law does not currently provide for a worker to opt for paid time off in lieu of payment under section 30(2) of the WRA.	It is suggested that the possibility for paid time off under section 24(4A(a) of the WRA.
Section 45(5) – annual leaves for part time employees and section 46(2) – sick leaves for part time workers	The computation of annual leaves for part-time employees is done per working day, rather than hours. As such, if a worker works for 5 days but half the amount of time, he would be entitled to 20 days' leave and it is not specified that the number of days of leave correspond to the hours for which work is performed. As such, a part time employee working 5 half days a week, would be entitled to 20 full days of leave. The same issue arises in relation to sick leaves.	This situation ought to be rectified.
Section 47 – Vacation lease	1. Section 47(4B) provides for the worker to be paid any leave which the employee has applied for and cannot be authorized to take. The law does not specify that, upon payment, the employee's vacation leaves shall be reduced by the number of days which are being paid for. 2. Section 47(3)(a) which requires vacation leaves to be for a period of not less than 6 consecutive days works to the detriment of the employee employed on a 5 days' week as it invariably means that 1 day's leave will always be lost.	1. Clarify that the 30 days' period refers to calendar days and not working days. 2. Review the minimum duration of vacation leave which may be taken from 6 to 5.
Section 52A – Childcare facilities	This provision cannot reasonably be implemented in practice as it gives rise to a number of issues: - If an employer employs 250 workers but in different locations, should there be a childcare facility in each location?	It is suggested that this provision be replaced by a childcare allowance for workers.

	- If both parents (mother and father) are employed in companies having more than 250 workers, on whom does the responsibility befall?	

5. Injury at Work and Compensation framework

47. Whilst the WRA uses the term "injury leave" on three occasions, such leaves are not provided for in the WRA or any other enactment.

48. Whilst section 64(1)(c) precludes a worker's temporary absence on grounds of injury to be a cause for his termination and section 64(1)(ca) provides that a worker may not be terminated where his performance at work is affected as a result of an injury sustained out of and in the course of work, where the worker produces a medical evidence from a Government medical practitioner that he has not fully recovered from the injury, there is no provision for any paid leave to allow for the recovery of a person who sustains injury at work and is incapacitated temporarily and beyond the duration of his sick, annual or vacation leaves that he may be entitled to.

49. It is submitted that, where a worker sustains injury at work (or whilst being conveyed to work), the economic consequences of such injury ought to rest with the employer and the employee cannot be made to deduct any resulting leave from his normal sick, annual or vacation leaves.

50. It is further proposed that, where a worker sustains injury at work, the employer be under an obligation to maintain the worker in employment for a minimum period of temporary disablement, following which, in the event that the worker does not recover or does not wish to remain in employment with that employer, a termination be possible with payment of severance allowance, which shall be to the exclusion of reimbursement of all medical expenses and moral damages payable to the worker. This provision will allow for greater weight to be given to the provisions under the Occupational Safety and Health Act.

51. Section 25 of the Social Benefits and Social Contributions Act provides for an industrial injury benefit representing 80% of the monthly earnings of an employee to be paid to him in case of temporary total incapacity for work. Such benefit is not, by virtue of section 25(3)(a), payable in respect of the first 2 weeks of each period of incapacity but the employer is required to pay to the employee a compensation for these two weeks at the same rate that he was being remunerated at the time when the industrial injury occurred. It is not clear whether this compensation is in lieu of, or in addition to, any remuneration payable. Pursuant to section 25(3)(d), the compensation payable for the first two weeks by the employer shall

be payable irrespective of the fact that whole or part of that period falls after the day on which the employment of the employee is terminated.

52. It is to be noted that the industrial injury benefit is payable under section 25(1) of the Social Benefits and Social Contributions Act in case of temporary total incapacity for work, and section 64(4) of the WRA, a worker may not be terminated by the employer by reason of his temporary absence from work because of injury or sickness duly notified to the employer and certified by a medical practitioner. **As such, section 25(3)(d) is not compatible with section 64(4) of the WRA and ought therefore be deleted or replaced by "irrespective of the fact that the whole or part of that period falls after the day on which the employee resigns"** since no termination can be done by the employer in those circumstances.

53. The Workmen's Compensation Act 1931 which provides for a framework for payment of compensation and liability of the employer for injuries at work is specifically limited to workmen as defined under that enactment and excludes a person whose earnings exceeds MUR 72,000 a year. In view of the provisions on minimum wages, this threshold is necessarily exceeded for all full time workers, except in the case of manual labour. It is submitted that this enactment will gradually become obsolete.

54. **Proposed Legislative Reform/Amendment 8** - It is therefore proposed that the scope of application of this Act should be extended to all workers as it provides for a fixed compensation payable by the employer in case of injury or death at work and therefore limits any litigation to the liability of the employer and the grounds for limiting or excluding liability of the employer are limited to serious and willful misconduct of the workman, thus providing for almost strict liability.

55. The extension of this regime to all cases of injury at work would allow for the effective enforcement of the provisions of the Occupational Safety and Health Act as far as liability of the employer to the employee for breach of these provisions is concerned.

6. Disciplinary Hearings – steering away from the David v Goliath situation

A. Access to information

56. Whilst acknowledging the need for the absence of formalism in the conduct of a disciplinary hearing, it remains the case that:

    56.1. whether for the purposes of the chairperson of the disciplinary hearing, or for the Court which is ultimately required to hear any grievance of an employee regarding the outcome of the case, the standard of proof is that of balance of probabilities. Even where the burden of proof is on the employer to show that termination was not unfair, the standard of proof is still balance of probabilities and if this standard is

met, there is a reversal of the burden and the employee still has to prove the unfairness of his dismissal;

56.2. both the chairperson of the disciplinary committee and the adjudicator hearing any grievance of the employee with the outcome are required to be independent of the employer and are therefore not familiar with the realities of the employer's workplace;

56.3. As such, it befalls on the employee to attempt to convince the chairperson of his explanations and to rebut any case of the employer which is proved on a balance of probabilities and he may only do so if he has, at his disposal, all the required documents and information to enable him to substantiate his explanations.

57. As the law currently stands, section 64(5) of the WRA only imposes an obligation on the employer, at the request of the worker, to make available for inspection to him or his representative, prior to the holding of the disciplinary hearing, such information or documents, as may be relevant to the charge, which the employer intends to adduce in evidence in the course of the hearing.

58. There is no provision in the WRA requiring an employer to provide the employee with information and documents which the employee reasonably requires to put forward his explanations and to convince the chairperson and eventually the court of his case. This issue is further exacerbated when we consider that Mauritian rules of evidence do not allow for discovery, such that the employee will, once terminated, not have an opportunity to secure documents which he may wish to rely on in proceedings for unfair dismissal.

59. There may be an argument to the effect that the need for the employer to provide such document and information which the employee reasonably believes he requires for his defence is implied as part of the obligation of the employer to act in good faith. However, in order to offer enhanced protection to the employee, it is submitted that section 64(5) of the WRA ought to be amended as follows:

60. **Proposed Legislative Reform/Amendment 9:**

(5) For the purpose of an oral hearing, the employer shall, at the request of the worker, ~~make available for inspection to him or his representative~~ (to be substituted by underlined part)*, prior to the holding of the disciplinary hearing, provide to him or his legal representative a copy of:*

(a) such information or documents, as may be relevant to the charge, which the employer intends to adduce in evidence in the course of the hearing;

(b) Such information or documents which the employee reasonably believes he may need to substantiate his explanations to the charges.

(5A) For the purposes of subsection (5)(b) above, the employer shall, upon request of the employee, provide the employee with supervised access to any electronic device or electronic system to enable the employee to retrieve such information or documents as he may reasonably need to substantiate his explanations to the charges.

(5B) Any information or document provided by the employer to the employee in pursuance of these provisions shall be communicated under the cover of confidentiality and may not be used for any purpose other than to enable the worker to provide his explanations during the oral hearing or for the purposes of any ensuing claim before the competent forum.

B. Access to witnesses

61. It is often the case that, once a worker is suspended from his duties pending an investigation or an oral hearing, that worker may not have the right to contact any other colleague and may therefore not be in a position to request such colleague to testify in the oral hearing.

62. Even where the employee, through his legal representatives, is able to ask a colleague to testify, the colleague may be unwilling to do so for fear of retaliation from the employer.

63. In order to cater for these situations, it is proposed that a specific protection be given to employees who testify in disciplinary hearings at the request of the employee who is convened to the oral hearing to provide his explanations.

64. **Proposed Legislative Reform/Amendment 10**

(1) Where, upon request from the worker who is convened to an oral hearing[13], another worker is called to give evidence or testify on behalf of the convened worker, the employer shall, subject to the consent of the other worker, make arrangements to release the other worker to attend the oral hearing to testify.

(2) No employer shall induce or threaten a worker to dissuade him from testifying in the oral hearing or in proceedings before any court or tribunal on behalf of another worker.

(3) Where a worker testifies in the oral hearing or in proceedings before any court or tribunal on behalf of another worker, the employer shall not take any step or

[13] The term "oral hearing" is the term used in the WRA to denote the disciplinary committee. To ensure consistency in the WRA, the term "oral hearing" has been used in the proposal as well.

action in retaliation and shall not discriminate against that worker for the decision of the worker to testify in the oral hearing or for the content of his testimony.

C. Access to report of the chairperson of the disciplinary committee

65. Employees are routinely denied access to the report of the chairperson which ensues from the disciplinary committee on grounds that this report is a document which is internal to the company and is confidential, and/or the premise that the employer is not, in any event, bound by the findings of the chairperson.

66. It is submitted that this state of affairs is frustrating for the employee who was made to undergo an often daunting and emotionally laden disciplinary process, with no visibility on the resulting findings.

67. The report of the chairperson contains data related to the employee and his employment and will often form part of the personnel file of the employee. For this reason, the report of the chairperson, although it contains the opinion of the chairperson, in fact contains data of the employee which has been processed, and is therefore caught by the provisions of the Data Protection Act.

68. As data subject, the employee is entitled to a copy of the report of the chairperson and it is proposed that this right to access to the report of the chairperson, although mandatory upon application of the Data Protection Act, be given an express statutory footing in the WRA.

69. **Proposed Legislative Reform/Amendment 11**

(10) An employer shall, within 7 days of the receipt of a written request from or on behalf of the worker, give a copy of the minutes of proceedings and the report of the chairperson of the disciplinary hearing –

(a) to the worker who has appeared before a disciplinary hearing; and

(b) to the person assisting the worker in the disciplinary hearing.

D. Appeals from disciplinary hearings

70. Article 15 of the Seventh Schedule to the Employment Relations Act provides for an appeal mechanism available to any worker against whom disciplinary sanction is taken. The appeal has to be made within one month of the worker becoming aware of the decision of the employer and is heard by an Appeal Board consisting of 3 persons who are not involved in the disciplinary proceedings.

71. The Seventh Schedule is only binding for employers having a recognized trade union in place.

72. It is submitted that the appeal mechanism ought to be integrated into the Workers' Rights Act so that it is applicable to all employers. In addition, the law has to cater for the permissible grounds of appeal.

73. **Proposed Legislative Reform/Amendment 12**

(1) A worker against whom any disciplinary sanction is taken may appeal to the Management or any person so appointed by the employer to review any sanction administered to him.

(2) The appeal shall be submitted in writing within 7 days of the date the worker becomes aware of the decision of his employer and shall state the grounds for such appeal.

(3) An Appeal Board consisting of 3 persons shall be appointed by the Management to hear the appeal and can include employees of the employer or any other persons who are not connected to the subject-matter of the charges, any investigation into the charges or the disciplinary proceedings.

(4) The Appeal Board shall hear the worker not later than 2 weeks after the date of the appeal and submit its report not later than one week after the date of the hearing and may:

(a) uphold the sanction;

(b) reduce the level of the sanction;

(c) overturn any sanction.

(5) The appeal is not a rehearing of the evidence and the Appeal Board may allow evidence to be adduced only to the extent that such evidence was not available for the disciplinary proceedings.

(6) The grounds for appeal may include, without limitation, matters such as:

(a) the reasonableness of the sanction;

(b) any procedural unfairness;

(c) new evidence now being available.

(7) The employer shall be bound by the decision of the Appeal Board against which it shall have no recourse.

7. Summary of Proposals

Issue	Proposal
Jurisdiction of Mauritian courts for employment disputes with cross-border elements	Proposal 1 – para 9
Determining the scope of application of Mauritian employment law	Proposal 2 – para 16 (2 options)
Guaranteeing employee's freedom to move from employer to employer and framing restrictive covenants	Proposal 3 – para 34
Enforcing Equality of Opportunities guarantees	Proposal 4 - para 27 and Proposal 5 – para 34
Starting the employment relationship - Probation Periods	Proposal 6 – para 44
Issues and inconsistencies with Workers' Rights Act	Proposal 7 – para 46
Injury at Work and Compensation framework	Proposal 8 – para 54
Disciplinary hearings – access to information	Proposal 9 – para 61
Disciplinary hearings – access to witnesses	Proposal 10 – para 65
Disciplinary hearings – access to report of the chairperson	Proposal 11 – para 70
Appeals from disciplinary hearings	Proposal 12 – para 74

8. Pending issues

74. A few issues which have remained unaddressed, but which merit attention are as follows:

74.1. The implication of the "lifespan" of disciplinary sanctions as provided for in the Code of Conduct at the Fourth Schedule to the Employment Relations Act and what it implies for an oral warning, written warning or final written warning to be "disregarded" after 3, 6, and 12 months respectively. Does it imply that the sanction is taken off the personnel file, or if similar conduct occurs after 2 years, the employer cannot rely on the earlier sanction as evidence of the fact that the employee was cautioned against similar conduct/omission in the past?

74.2. Whether the jurisdiction of the Industrial Court ought to exclude claims for severance allowance, in favour of the jurisdiction of the Employment Relations Tribunal, as is the case under English law.