EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 20/19

Before

Indiren Sivaramen	**Acting President**
Raffick Hossenbaccus	**Member**
Jeanique Paul-Gopal	**Member**
Parmeshwar Burosee	**Member**

In the matter of:-

Mr Ringanaden Sawmynaden (Disputant)

And

Mauritius Cane Industry Authority (Respondent)

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(7) of the Employment Relations Act (hereinafter referred to as "the Act"). The parties were assisted by Counsel. The terms of reference of the points in dispute read as follows:

> *"Whether the formula used to calculate the piece rate paid to the complainant should have used the rate of Rs 165 per 1000 bags for the 1 to 2500 bags and Rs 264 per 1000 bags for 2501 to 3500 bags instead of Rs 152 per 1000 bags for 1 to 3000 bags Rs 264 per 1000 bags for 3001 to 3500 bags for the wages paid in the year 2017."*
>
> *"Whether the formula used to pay the piece rate of the complainant working both at Albion Dock and New Warehouse during a single month should be the same as the formula used to pay the piece rate of those working at the New warehouse solely during a single month."*

The Tribunal has already delivered a ruling in the present matter following preliminary points raised on behalf of Respondent. The Tribunal ruled that the preliminary objections taken under two limbs were premature and that evidence would have to be adduced first. The preliminary points raised under those two limbs read as follows:

Respondent moves that the present dispute be set aside in as much as -

(a) ex facie, the point in dispute does not tantamount to a labour dispute as defined in section 2 of the Employment Relations Act since:-

(i) it arose more than 3 years from the time it has been reported; and

(ii) Disputant has opted to be governed by the recommendations made in the report by Edge Consulting Ltd, which carried out a review of pay, grading structures and other conditions of service of the workers, including Disputant and which recommendations would be final subject to corrections and review of errors and omissions;

It is apposite to note that whilst this case was pending before the Tribunal, the Act was amended by the Employment Relations (Amendment) Act (Act No. 21 of 2019) which came into effect as from 27 August 2019 (in relation to provisions relevant to the present matter). Sub-section 9 of Section 108 (Savings and transitional provisions) of the Act as amended by Act No. 21 of 2019 reads as follows:

108(9) Any labour dispute pending immediately before the commencement of the Employment Relations (Amendment) Act 2019 before the Tribunal shall be dealt with in accordance with Part VI as if the definition of "labour dispute" in section 2 and sections 64, 65, 69, 70, 76, 78 and 88 have not been amended or repealed and replaced.

This case will thus be dealt with in accordance with this transitional provision. "Labour dispute" was thus defined at section 2 of the Act (prior to the 2019 amendment) as follows:

"labour dispute" –

(a) means a dispute between a worker, or a recognised trade union of workers, or a joint negotiating panel, and an employer which relates wholly or mainly to wages, terms and conditions of employment, promotion, allocation of work between workers and groups of workers, reinstatement or suspension of employment of a worker;

(b) does not, notwithstanding any other enactment, include a dispute by a worker made as a result of the exercise by him of an option to be governed by the recommendations made in a report of the Pay Research Bureau or a salary commission, by whatever name called, in relation to remuneration or allowances of any kind;

(c) does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute

In its earlier ruling, the Tribunal observed that ex facie the pleadings and terms of reference of the dispute/s, it was not possible to identify clearly the act or omission which gave rise to the dispute. The terms of reference have been drafted in a very peculiar not to say odd manner. Indeed, the terms of reference start with "*Whether the formula used to calculate the piece rate paid to the complainant should have used the rate of …*[given rates] *instead of* …[other given rates] *for the wages paid in the year 2017*." Obviously, the 'formula' does not, by itself, like a natural person, decide on the rate. The crux of the dispute before us appears to be a challenge to a particular rate used as opposed to another rate which it is suggested should have been used to calculate the piece rate paid to Disputant. Under the first dispute, the Tribunal is only concerned with the rate used to calculate the piece rate paid to Disputant for the wages paid in the year 2017. The Tribunal cannot award that any other rate should have been applicable apart from the two rates mentioned in the terms of reference.

Evidence has been adduced lengthily on behalf of both parties in the present matter. The Respondent is still relying on the preliminary objections under the two limbs mentioned above (under a(i) and a(ii) above). Subject to what we already stated in our ruling in relation to the poor drafting of the preliminary points taken, the Tribunal bears in mind that the objections are based on the definition of "labour dispute" as per section 2 (as it was prior to the 2019 amendment) of the Act. Also, since the objections relate to the very jurisdiction of the Tribunal to hear the matter, the Tribunal proposes to deal with these two points first. A dispute that is reported more than three years after the act or omission that gave rise to the dispute is not a labour dispute for the purposes of the Act. What is the act or omission that gave rise to the first dispute? The Tribunal has analysed carefully the whole evidence adduced before it and it is clear beyond any doubt that the Disputant is not challenging the alleged annual "indexation" of the rate used to calculate the piece rate or the indexation of the piece rate. This is not the dispute before us and no evidence whatsoever was adduced suggesting that the "indexation" (for whatever year) was not in order. The dispute is in relation to two possible rates for the calculation of piece rate where according to the Disputant, he should have benefited from an established higher rate instead of another established but lower rate. This is why as per the terms of reference, the Tribunal is not granted any discretion (as opposed to if there was, for example, "or otherwise" in the same terms of reference) and has to award as per the lower rate or the higher rate. This is in line with the submissions made before us on behalf of the Disputant whereby two grounds are being relied upon, that is, (i) the rate falls foul of the collective agreement which forms part of the terms and conditions of employment of the Disputant and (ii) the principle of equal pay for "equal value of work".

As per the evidence before us, the principle of having two rates can be traced to, at least, as far back as from 1 July 2008 (theoretically) following the collective agreement entered into on 30 June 2009 between the Bagged Sugar Storage and Distribution Co. Ltd (BSSD, which was later "acquired"/ taken over by the Respondent) and the Port Louis Harbour and Dock Workers Union (Annex A to the Statement of Case of the Disputant). It is however not disputed that there was a difference between what was provided for in the collective agreement (rates depending on whether "imported sugar for local consumption" or "local production") and what was being applied by the BSSD. One of the main grounds relied upon by the Disputant is in fact that the rate falls foul of the collective agreement which in turn forms part of the terms and conditions of employment of the Disputant. The collective agreement is the collective agreement entered into in 2009 (effective as from 1 July 2008) between the then recognised trade union (for the relevant bargaining unit) and the ex BSSD, and the agreement was valid until 30 June 2013 (copy annexed as Annex A to the Statement of Case of Disputant). The Edge Consulting Report which was effective as from 1 July 2013 provided that the current practice (underlining is ours) should be maintained as regards the existing piece rate system. It also gave the reasons why it was not intervening to "review the existing piece rate system used at the BSSD".

Then the Edge Consulting Report recommended for a particular mechanism to be established for examining and considering the various available options which were responsive and suitable for the working environment at the BSSD so that a new working arrangement and formula could be worked out to the satisfaction of all parties concerned. Though it was submitted on behalf of Disputant (in the written submissions at paragraphs 26 and 27) that the alleged absence of agreement of all parties (in or around July 2015) was an omission on the part of the Respondent and which gave rise to part of the current dispute, the Tribunal is not satisfied that this was the omission which gave rise to the present dispute. Firstly, the Edge Consulting Report refers to "a new working arrangement and formula" which will have to be worked out to the satisfaction of all parties and not merely to an increase in rate (with the actual system being still in place). Secondly, the Disputant has failed to adduce any evidence that the union was not agreeable with the increase granted and which was eventually paid to the Bag Handlers including to members of the said union.

It is also submitted (still on behalf of the Disputant) that the omission which gave rise to the present dispute arose in January 2017 when the piece rate was increased in 2017. The Tribunal will refer to the case of **Mrs D. Ramyead-Banymandhub and The Employment Relations Tribunal, i.p.o Air Mauritius Ltd, 2018 SCJ 252**, where the Supreme Court stated the following:

"The respondent therefore failed to consider the possibility that the co-respondent's alleged omission could have been continuous, thereby seriously affecting the whole

basis of the Tribunal's computations whilst determining the objections related to time limits."

It is submitted on behalf of the Disputant that the Respondent has infringed the terms and conditions of employment of the contract of employment when the piece rate was increased in 2017. Under the first limb of the preliminary objections (paragraph (a)(i) (above)), the Tribunal is unable to find that the first dispute was not a labour dispute (on the basis of the Supreme Court judgment in the case of **D. Ramyead-Banymandhub (above)**) since the dispute was specifically in relation to the wages paid in the year 2017 and the dispute was reported within three years, that is, on 13 August 2018 (as per the letter of referral from the Commission for Conciliation and Mediation). The rates mentioned in the terms of reference of the first dispute are specific for the year 2017 and as per Doc E and the evidence adduced, the rates were different even for the year 2016 (and similarly for previous years). The preliminary objection under limb (a)(i) of the preliminary objections is thus set aside as regards the first dispute. As regards the second dispute, there is no indication at all of any date or the period of time under consideration and the Tribunal certainly cannot make any assumption that the dispute was reported more than 3 years after the act or omission that gave rise to the said dispute. The preliminary objection under limb (a)(i) of the preliminary objections is also set aside as regards the second dispute.

The Tribunal will now deal with limb (a)(ii) of the preliminary objections (see above).

A copy of the option form signed by the Disputant has been produced (Doc A) and the latter acknowledged in Doc A having taken cognizance of both the Edge Consulting Report 2014 and Edge Consulting Supplementary Report 2014 on the Review of Pay Structure and Conditions of Service at the BSSD. Disputant opted to accept the revised emoluments and terms and conditions of service. It is apposite to quote what was stated in the Edge Consulting Report 2014 (copy marked Doc B) in relation to "Piece Rate". It read as follows:

"***5.7 Piece Rate***

There has been a request from the Union to review the existing piece rate system used at BSSD.

Given its implications, financial and otherwise, we are recommending that a ***Joint Working Consultative Committee*** *be established with representatives of all stakeholders to examine and consider the various available options which are responsive and suitable for the BSSDs working environment in view of rewarding committed and performing employees for increased work load and productivity.*

In the meantime, the current practice at the BSSD will remain unchanged until such time that a new working arrangement and formula is worked out at the satisfaction of all parties concerned."

The Edge Consulting Supplementary Report 2014 (copy marked Doc C) provided as follows:

"8. Overtime Pay/Piece Rate

The request to re-consider our recommendation pertaining to the above has not been acceded to; hence the recommendation made in our main Report will be maintained."

In relation to the piece rate, the Edge Consulting Report thus did not bring any changes and the "current practice" at the BSSD was to remain unchanged until an agreed new working arrangement and formula was worked out. The Respondent is not saying that the dispute is not a labour dispute because Disputant signed an option form in relation to the initial 2009 agreement entered into between the relevant trade union and the BSSD (Annex A to the Statement of Case of Disputant). The Respondent is referring specifically to the option form signed by Disputant on 23 May 2014 in relation to the Edge Consulting Reports (Doc A). The provisions mentioned in these reports in relation to the "Piece rate" have already been quoted above. The Consultant, thus, refused to review the existing piece rate system used at BSSD despite the request made by the union. This was agreed to by the Disputant among other terms and conditions which were provided for in the Edge Consulting Reports.

As regards the preliminary objection under paragraph (a)(ii) (see above), the present disputes do not arise as a result of the exercise by Disputant of an option to be governed by the recommendations made in the Edge Consulting Reports. The present matter may be distinguished from the cases of **Mr L.R Rose & others And Mauritius Cane Industry Authority, ERT/RN 52-55/17**, where the terms of reference were as follows:

"*"Whether the piece rate should be increased by 27% as recommended by Edge Consulting Report 2014 effective as from 1st of July 2013 instead of 15% as wrongly adjusted by the Mauritius Cane Industry Authority (Sugar Storage Handling Unit, ex. Bagged Sugar Storage and Distribution Co. Ltd."*

The Tribunal, in that case, stated the following: *"The dispute before us very importantly arises directly from and because of the exercise by the disputants of the option to be governed by the recommendations made in the Edge Consulting Report 2014. If they had not exercised the relevant options there would have been no dispute before us as*

to "[w]hether the piece rate should be increased by 27% as recommended by Edge Consulting Report 2014 as from 1st of July 2014 …." The dispute arises clearly as a result of the exercise by the disputants of an option to be governed by the recommendations made in a report of a salary commission. The dispute is in relation to remuneration or allowances of any kind."

In the present case, it is clear that the Edge Consulting Report 2014 does not review the existing piece rate system used at the BSSD but in fact simply stated that the "current practice at the BSSD will remain unchanged until such time that a new working arrangement and formula is worked out at the satisfaction of all parties concerned." Though the Tribunal will not venture to find out why terms of reference were drafted as they were in the previous cases of **Mr L.R Rose & others (above)** (assuming the report mentioned in those cases was the same report as in the present matter) it is clear that the disputes as referred to the Tribunal in those cases could not be entertained. The situation is different in the present matter. There is no conclusive evidence on record that the present disputes were made as a result of the exercise by Disputant of an option to be governed by the recommendations made in a report of a salary commission. The two Edge Consulting reports came out in 2014 and the first dispute refers to particular rates used and rates which according to the Disputant should have been used to calculate the piece rate for the "wages paid in the year 2017". The Tribunal is not prepared to find that the terms of reference as drafted in this particular case refer to disputes which were made as a result of the exercise of the option to be governed by the recommendations made in the Edge Consulting Reports of 2014. The rates mentioned in the terms of reference (be it the rates used or which should have been used as per the terms of reference) come into play only in the year 2017 and <u>not as from 2014</u> following the Edge Consulting Reports. The dispute is not made as a result of the exercise by Disputant of an option to be governed by the recommendations made in the Edge Consulting Report 2014. The first dispute, at least, has more to do with the period 2017 and refers to specific rates whereas the Edge Consulting Report does not cater for details of rates to be used. Thus, in the light of the evidence on record, the Tribunal finds that the first dispute does not fall under the proviso at paragraph (b) of the then definition of 'labour dispute' at section 2 of the Act. The preliminary objection under paragraph (a)(ii) (which, in any event, was not drafted using the exact wording of the said paragraph (b) of the definition of 'labour dispute'(as it was then)) is thus also set aside as regards the first dispute. It has not been averred how the second dispute as couched is related to the option form signed in 2014 and the objection under paragraph (a)(ii) is also set aside as regards the second dispute.

The Tribunal will thus deal with the merits of the case. It is apposite to note that though Annex A to the Statement of Case of Disputant refers to an agreement reached between BSSD and the relevant trade union that the recommendations of the ***Doomun***

Report & Comments on 'Review of salary structures and conditions of employment' at the BSSD be implemented as from 1 July 2008, the Tribunal has not been enlightened as to the recommendations of the 'Doomun Report & Comments'. We simply have it from Annex A to the Statement of Case of Disputant that the piece rates mentioned under paragraph "18.6.2" (not provided) were amended to read as per paragraphs 1(a) and 1(b) of the said Annex A. The Tribunal will thus have to make many assumptions in relation to the said 'Doomun Report & Comments' including that there is no rationale provided in that report for the distinction made under paragraphs 1(a) and 1(b) of Annex A (above) or that the Doomun Report provided under the said paragraph 18.6.2 for the same distinction as under the 2009 Agreement between BSSD and the relevant union (Annex A (above)), that is, "Imported sugar for local consumption" versus "local production". This is a shortcoming in the case of the Disputant, the more so that the disputes are exactly in relation to this distinction which was allegedly wrongly applied. It is apposite to note that the case of the Disputant is not that he is challenging the agreement entered into in Annex A to his Statement of Case but that the said agreement was not being applied as it should have been.

Thus, basically Disputant is not challenging the difference in rates as per Annex A (above) on the ground of equal remuneration for work of equal value. Disputant is in fact relying (underlining is ours) on Annex A (above) as part of his case before us. He is averring that the wrong basis was being applied right from the start and that this wrong basis, which was in contradiction with the collective agreement (Annex A (above)), was perpetuated as the rates were being revised annually. Very importantly, the Disputant avers that the BSSD stopped importing sugar in the year 2012. If the submissions made on behalf of Disputant were to be upheld, it would appear then that the difference in rates as from 2012 had, according to Disputant, no basis at all and was plainly wrong. However, the present dispute (especially under the first limb) does not pertain at all to rates used for the year 2012 or thereafter but only and specifically for the year 2017. This and the evidence adduced before us lead to the unavoidable conclusion that the "practice" during all that time was to use different rates and this was not based on whether sugar was imported or not (since at least as from 2012, BSSD stopped importing sugar). What appears to be written on Annex A (above) and which may be subject to whatever was provided for in the **Doomun Report & Comments** (and which was not disclosed to the Tribunal) was not followed at the BSSD or the Respondent well before the Edge Consulting Reports in 2014. Thus, when the Edge Consulting Report of 2014 (for BSSD) provides under the heading "Piece Rate" that "In the meantime, the current practice at the BSSD will remain unchanged until such time that a new working arrangement and formula is worked out at the satisfaction of all parties concerned", it is not unreasonable at all to find that the Edge Consulting Report meant the actual current practice and not what had to be academically and literally interpreted from the 2009 Agreement (Annex A) and which clearly was not being applied as per the evidence

adduced including that of the Disputant. The Edge Consulting Report does not refer to the previous collective agreement or to terms and conditions as per the previous collective agreement but to the "current practice". One cannot aver that an existing (or previous) collective agreement was being wrongly applied over a period of time and that the "current practice" should thus be or be deemed to be what was provided for under that collective agreement.

The Tribunal comes to this conclusion even though it has considered the explanation which the Disputant has tried to put forward that he was not aware of the actual contents of the collective agreement for some time. The Tribunal has not been impressed with this explanation the more so that no evidence was adduced from the relevant trade union/s, and the Disputant was working in an organization where there was a recognised trade union which was supposed to look after the interests of Bag Handlers.

Disputant relied on the principle of equal remuneration for work of equal value. Counsel for Disputant relied on the case of **Capper Pass Ltd v Lawton [1977] 1977 QB 852** in relation to what is "like work". It is apposite to note that whilst section 20 of the now repealed Employment Rights Act ("***Equal remuneration for work of equal value***") did not contain at all the term "like work", section 26 (bearing the same heading as the then section 20 of the repealed Employment Rights Act) of the new Workers' Rights Act 2019 does refer to "like job" at sub-section (2)(c). Be that as it may, the Disputant curiously is relying on the agreement entered into on 30 June 2009 (Annex A to the Statement of Case of Disputant) to suggest that rates should have differed, based on this agreement, depending on whether it was "imported sugar for local consumption" or "local production" (and not at which warehouse the work was being performed). There is no evidence of any challenge against the agreement of 30 June 2009 which was in the form of a collective agreement. However, the Disputant is averring that for wages paid in 2017, the 'practice', which was allegedly wrong right from the start because it was contrary to what was provided in the collective agreement, could not stand. Disputant averred that BSSD had stopped importing sugar since 2012 and thus in line with the "current practice" at the BSSD, which was unilaterally interpreted by Disputant as meaning something akin to 'as should have been applied as per the collective agreement', the BSSD should have applied the same rates to all warehouses where in fact only sugar from local production was stored.

There are many fallacies in such an argument and the first one being that the evidence adduced including that of Disputant clearly shows that the current practice at the BSSD was not as per what can be understood (in the absence of any evidence in relation to the Doomun Report & Comments) from paragraphs 1(a) and 1(b) of Annex A to the Statement of Case of Disputant. This is clearer as from 2012 when BSSD stopped importing sugar. Also, the Disputant opted for the Edge Consulting Report on 23 May

2014 (Doc A) and there is evidence that the alleged wrong practice *("couma pe mal payer avant line continuer coumsa mem, mal payer"* as Disputant would put it) continued whereby different rates were still being applied depending on the particular warehouse where sugar was stored. More importantly, whilst a collective agreement was reached as far back as June 2009 (Annex A to the Statement of Case of Disputant) providing specifically for two rates (at least) for "imported sugar for local consumption" and "local production", there is no suggestion at all from the Disputant that this was against the principle of equal remuneration for work of equal value or gave rise to some sort of discrimination. No evidence has been adduced as to the actual processes involved or effort to be supplied by Bag Handlers in relation to "imported sugar for local consumption" and "local production". Though no evidence was adduced in relation to the actual input of work required from Disputant as Bag Handler, unsupported submissions were made in the 'written submissions' filed on behalf of Disputant that, for example, more intensive work was performed at the Albion dock than at the mechanised warehouse/s. To enable the Tribunal to assess whether work performed at the Albion dock on the one hand and work performed at the mechanised warehouses on the other hand amounted to work of "equal value", the Tribunal must be in presence of sufficient evidence to reach a decision on the matter. It is impossible based on the insufficiency of the evidence before us to find that there were no such differences between the works to be carried out at these warehouses/dock which ought to be reflected in the terms and conditions of employment of Bag Handlers. The unchallenged evidence on record is that even for "imported sugar for local consumption" and "local production", relevant parties at that time (the relevant trade union and the BSSD) thought it wise and appropriate to provide different rates for the same grade of workers, that is, Bag Handlers. These different rates are not being challenged at all by the Disputant as being discriminatory, unfair or against the principle of equal remuneration for work of equal value.

For all the reasons given above, the Tribunal finds that the Disputant has failed to prove that the formula used to calculate the piece rate paid to the Disputant for the wages paid in the year 2017 was wrong. The Tribunal has not been satisfied on a balance of probabilities that the formula used to calculate the piece rate should have used the rate of Rs 165 per 1000 bags for the 1 to 2500 bags and Rs 264 per 1000 bags for 2501 to 3500 bags instead of Rs 152 per 1000 bags for 1 to 3000 bags Rs 264 per 1000 bags for 3001 to 3500 bags for the wages paid in the year 2017. The dispute under the first limb is thus set aside.

As regards the second limb of the dispute, the Tribunal has examined carefully all the evidence adduced on record. There is no evidence on record that Disputant was "working both at Albion Dock and New Warehouse during a single month". There is also no evidence as to which particular month or months this would have been the case.

As per the evidence, this dispute appears to be in the nature of a hypothetical question which is put before the Tribunal. The Tribunal does not deliver awards in relation to hypothetical or academic questions (vide **Mr Ugadiran Mooneeapen And The Mauritius Institute of Training and Development, RN 35/12; Mr Y.I.A Cheddy And The State of Mauritius, i.p.o The Ministry of Civil Service and Administrative Reforms and Anor, RN 92/17**). In the same vein, bearing in mind the manner in which the terms of reference have been couched (hinted to above when the peculiar manner in which the terms of reference had been couched was referred to) for both disputes, it would appear that an award of a declaratory nature is being sought from the Tribunal. The Tribunal has stated in numerous cases (**vide Mr Ugadiran Mooneeapen (above); Mr Abdool Rashid Johar And Cargo Handling Corporation Ltd, RN 93/12; Mr Dhan Khednee And National Transport Corporation, RN 52/14; Mr Satianund Nunkoo And Beach Authority, RN 121/17**) that it does not deliver awards which are of a **declaratory nature**. The Tribunal delivers awards which are binding on parties (Section 72 of the Act).

For all the reasons given above, the second dispute is also set aside and both disputes are thus set aside.

SD Indiren Sivaramen

Acting President

SD Raffick Hossenbaccus

Member

SD Jeanique Paul-Gopal

Member

SD Parmeshwar Burosee

Member

2 June 2020