

**EMPLOYMENT RELATIONS TRIBUNAL**

**RULING**

**ERT/ RN 69/20-71/20**

**Before**

|                           |                       |
|---------------------------|-----------------------|
| <b>Indiren Sivaramen</b>  | <b>Vice-President</b> |
| <b>Francis Supparayen</b> | <b>Member</b>         |
| <b>Rabin Gungoo</b>       | <b>Member</b>         |
| <b>Kevin C. Lukeeram</b>  | <b>Member</b>         |

**In the matter of:-**

**Mrs Anuradha Bundhun (Disputant No 1)**

**And**

**ABSA Bank (Mauritius) Ltd (Respondent)**

**i.p.o Barclays Bank Mauritius Staff Association (Co-Respondent)**

**Mrs Bhojraj Daby (Disputant No 2)**

**And**

**ABSA Bank (Mauritius) Ltd (Respondent)**

**i.p.o Barclays Bank Mauritius Staff Association (Co-Respondent)**

**Mrs Sujata Retif (Disputant No 3)**

**And**

**ABSA Bank (Mauritius) Ltd (Respondent)**

**i.p.o Barclays Bank Mauritius Staff Association (Co-Respondent)**

The above cases have been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(9)(b) of the Employment Relations Act 2008, as amended (hereinafter referred to as “the Act”). The Co-Respondent has been joined as a party in the present matter in the interests of justice and all three cases were consolidated with the agreement of parties. All three disputants, the Respondent and the Co-Respondent were assisted by Counsel. The terms of reference are identical in all three cases, except in the case of Disputant No 3 where the effective period mentioned was as from November 2016 (instead of July 2017), and read as follows:

*“Whether the terms and conditions of employment (salaries, end of year bonus, financial bonus, travelling, travel grant, leave entitlement, merit increase among others) following my promotion to the grade of AVP should be realigned with those of staff which have been promoted prior to January 2016 with effect from July 2017 or otherwise.”*

The Respondent has taken a plea *in limine* which reads as follows:

*“(1) All three disputants are bound by the terms and conditions of a contract of employment that they have voluntarily signed and are therefore stopped from raising a dispute before the Tribunal.*

*(2) The disputants are relying on a collective agreement between the bank and the union which had already expired at the time that they had signed their contract of employment.*

*(3) The collective agreement is between the union and the Respondent and the individual disputants cannot report and try to enforce any dispute under same. They do not have a locus to decide.*

*The Respondent moves that the case be set aside.”*

The plea *in limine* was resisted on behalf of the disputants and the Co-Respondent and the Tribunal proceeded to hear arguments on the plea *in limine*.

The Respondent has adduced some evidence for the purpose of the arguments and this includes copies of the terms and conditions of employment purported to have been entered into by the disputants (Docs A, B and C) and collective agreements entered into between Barclays Bank Mauritius Ltd and the Co-Respondent in 2013 and 2018 (Docs D and E respectively). The representative of the Respondent who produced the documents stated that the collective agreement entered into in 2013 was valid until 4 September 2016 so that, except for the salaries, the collective agreement was not in force when the disputants signed their contracts of employment.

In cross-examination, the representative of Respondent initially accepted that the collective agreement signed in August 2018 took effect as from 5 September 2016. However, later he stated that the disputants were bound by the conditions spelt out in their contracts of employment and by the only provision which, according to him, still prevailed from the 2013 collective agreement at the time the disputants signed their contracts of employment, that is, the provision in relation to salaries. The Tribunal has examined carefully the evidence adduced so far and the arguments offered by all Counsel.

The Tribunal has not been impressed by the submission made on behalf of Respondent that because the disputants have voluntarily signed their contract of employment they are simply stopped from raising a dispute before the Tribunal. Though a contract of employment is intrinsically a contract, yet it is subject to the “*caractère protecteur et impératif du droit du travail*”. Indeed, a contract of employment is characterised by the “*lien de subordination juridique qui existe entre l’employé et l’employeur.*”

Thus, the legislator has deemed it fit in certain circumstances to supplement what a contract of employment already provides with additional provisions or safeguards by way of statutory provisions. In the same vein, the Tribunal has been given wide powers under the Act which are more consonant with a less legalistic approach to the resolution of disputes. For instance, the Tribunal may here refer to section 97 of the Act which reads as follows:

**97. Principles to be applied by Tribunal, Commission and Board**

*The Tribunal, the Commission or the Board may, in the exercise of their functions in relation to a matter before them under this Act have regard, inter alia, to –*

- (a) the interests of the persons immediately concerned and the community as a whole;*
- (b) the need to promote decent work and decent living;*
- (c) the need to promote gender equality and to fix wages on the basis of job content;*
- (d) the principles of natural justice;*
- (e) the need for Mauritius to maintain a favourable balance of trade and balance of payments;*

- (f) *the need to ensure the continued ability of the Government to finance development programmes and recurrent expenditure in the public sector;*
- (g) *the need to increase the rate of economic growth and to protect employment and to provide greater employment opportunities;*
- (h) *the need to preserve and promote the competitive position of local products in overseas market;*
- (i) *the capacity to pay of enterprises;*
- (j) *the need to develop schemes for payment by results and, as far as possible, to relate increased remuneration to increased labour productivity;*
- (k) *the need to prevent gains in the wages of workers from being adversely affected by price increases;*
- (l) *the need to establish and maintain reasonable differentials in rewards between different categories of skills and levels of responsibility;*
- (m) *the need to maintain a fair relation between the incomes of different sectors in the community; and*
- (n) *the principles and best practices of good employment relations.*

The Tribunal may also refer to provisions such as sections 6(2)(a) (where the Tribunal may, subject to such conditions as it may determine, remit a matter to the parties for further consideration by them with a view to settling or limiting the several issues in dispute), 15 (where the Tribunal may deal with the substantial merits of any matter before it with a minimum of legal formalities in order to determine such matter fairly and promptly) and 20(1) (which provides that the Tribunal shall not be bound by the law of evidence in force in Mauritius) of the Second Schedule to the Act, among other provisions.

It is apposite to refer to what **Dr D. Fok Kan** has stated in ***Introduction au droit du travail mauricien, 1/ Les relations individuelles de travail, 2eme édition*** at page 217,

∫ **1: Devant L'Employment Relations Tribunal**

*Il convient de faire ressortir que les considérations de l'ERT sont différentes de celles d'une cour de justice. Il s'agit ici de litige où la solution ne dépend pas nécessairement d'une approche légaliste. Parmi les principes dont l'EAT a à faire application nous retrouvons non seulement les intérêts des personnes concernées mais également ceux de la communauté dans son ensemble et les principes et les pratiques conduisant à une bonne relation industrielle. C'est ainsi que le PAT [the Permanent Arbitration Tribunal as the Tribunal was then called] se réfère volontiers dans *In Re : Mrs D.C.Y.P. and The Sun Casino Ltd* aux 'fundamental principles of fair employment' pour résoudre le litige.*

At page 141 of the same book, **Dr D. Fok Kan** states the following:

*Dans les cas où il n'y a pas de RO [remuneration order], le salaire sera déterminé d'un commun accord entre les parties. Bien qu'il revienne aux parties d'en déterminer le montant, le législateur pose maintenant comme principe de base celui de 'equal remuneration for work of equal value'; "Every employer shall ensure that the remuneration of any worker shall not be less favorable than that of another worker performing the same type of work."*

The provision as cited by **Dr D. Fok Kan** above (section 20(1) of the repealed Employment Rights Act) has been repeated, in an amended form, in section 26 of the Workers' Rights Act 2019 under the heading 'Equal remuneration for work of equal value'.

We are in the realm of employment relations, and any blinkered or excessive fixation on a contract of employment to deny or stop a worker from having access to the Tribunal, may, apart from not being conducive to good employment relations, go against the essence of employment relations law. There is no evidence that the present disputes fall under section 71 or any other section of the Act which would exclude these disputes from the jurisdiction of the Tribunal. The issue raised under this limb is at best premature and the Tribunal will have to hear all parties before reaching any decision on the said disputes. The plea *in limine* under limb 1 is thus set aside.

The plea *in limine* under limb 2 is misconceived. Indeed, the averments made in the Statement of Case of a disputant are deemed to be accepted for the purposes of dealing with a plea *in limine*. Ex facie, the Statements of Case and Reply filed, the validity period of the collective agreement of 2013 is disputed between the parties. The Tribunal will certainly not make any pronouncement on this issue or any related issue without having given the opportunity to all parties, including disputants, to be heard in relation to same. Also, the case for the disputants is not exclusively based on the collective agreement. Thus, the disputants rely, for example, on and refer at paragraph 3 of their Statements of Case to the above-mentioned principle of 'equal remuneration for work of equal value'.

Moreover, the terms of reference of the disputes do not refer at all to the collective agreement. The plea *in limine* under this limb also cannot stand and is set aside.

As regards limb 3 of the plea *in limine*, the Tribunal, again, finds no reference at all in the terms of reference to the collective agreement. The disputants have raised a dispute which pertains to their terms and conditions of employment and this falls squarely within the definition of what can constitute a labour dispute under the Act. There is no evidence that the dispute relates to any issue which is covered by section 71 of the Act. The Tribunal will not, at this stage, make any assumption that the disputants are trying to enforce a dispute under the collective agreement when the terms of reference do not refer at all to any collective agreement and that, instead, in the Statements of Case of the disputants, the principle of 'equal remuneration for work of equal value' is being relied upon.

In any event and even if reference is made to a collective agreement, the Tribunal will refer to section 56(1) of the Act which provides as follows:

#### **56. Application of collective agreement**

(1) A collective agreement shall bind-

- (a) the parties to the agreement; and
- (b) all the workers in the bargaining unit to which the agreement applies.

In the case of **State Bank of Mauritius Limited v A.Jagessur 2008 SCJ 8**, the Supreme Court stated the following:

*It is important to note that contract negotiation and conclusion has remained a matter of individual choice. However, where there is a collective agreement, it creates a “régime de travail” where individual choices are relegated to collective choice. As Répertoire Travail Dalloz, Conventions et Accords (Régime Juridique), paragraph 97 states:*

*“Définissant un régime de travail, la Convention ou l'accord collectif du travail a, notamment, pour objet de fixer les conditions auxquelles doivent répondre les contrats individuels de travail.”*

Thus, there is nothing so far on record which shows that the disputants have no locus 'to decide' or cannot report the present disputes.

The plea *in limine* under this limb is at best premature and is also set aside.

For all the reasons given above, the Tribunal will thus proceed to hear the consolidated cases on their merits.

**SD Indiren Sivaramen**

**Vice-President**

**SD Francis Supparayen**

**Member**

**SD Rabin Gungoo**

**Member**

**SD Kevin C. Lukeeram**

**Member**

**8 October 2020**