EMPLOYMENT RELATIONS TRIBUNAL

RULING

ERT/ RN 107/20-135/20

Before

Indiren Sivaramen	**Vice-President**
Francis Supparayen	**Member**
Rabin Gungoo	**Member**
Ghianeswar Gokhool	**Member**

In the matter of:-

Mr Danny Clarel Agathe and Others (Disputants)

And

The State of Mauritius as represented by The Ministry of Finance, Economic Planning and Development (Respondent)

i.p.o (1) Pay Research Bureau (Co-Respondent No. 1)

(2) Ministry of Public Service, Administrative and Institutional Reforms

(3) Public Service Commission

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"). All twenty-nine cases were consolidated and the Co-Respondents were joined as parties to the proceedings. All the disputants, the Respondent and the Co-Respondents were assisted by Counsel. The terms of reference are identical in all the cases and read as follows:

"To amend the Scheme of Service for the post of FO/SFO – Financial Officer/ Senior Financial Officer to enable the grade of AFO – Assistant Financial Officer to be eligible for appointment to the grade of FO/SFO."

The Respondent has raised preliminary objections which read as follows:

"Respondent moves that the present dispute be set aside inasmuch as:-

(a) the point in dispute does not constitute a labour dispute as per the definition of labour dispute under section 2 of the Employment Relations Act;
(b) the granting of an award in terms of the terms of reference of the dispute before the Tribunal will be inconsistent with regulation 15 of the Public Service Commission Regulations and thus, be contrary to section 72(5) of the Employment Relations Act; and
(c) the present dispute constitutes a disguised application for Judicial Review and/or constitutional redress and this is not the appropriate forum for such action."

Counsel for Disputants moved that the cases be proceeded with and the Tribunal thus proceeded to hear arguments on the preliminary objections taken. The Tribunal has examined carefully all the arguments submitted on behalf of the Disputants and the Respondent.

The relevant part of the definition of "labour dispute" under section 2 of the Act reads as follows:

"labour dispute" –

(a) means a dispute between a worker, a recognised trade union of workers or a joint negotiating panel, and an employer which relates wholly or mainly to –

(i) the wages, terms and conditions of employment of, promotion of, or allocation of work to, a worker or group of workers;

(ii)….

In the present case, it is not disputed that there is a dispute between a worker or, more exactly, between several workers (Disputants) and an employer, that is, the State of Mauritius as represented by the Ministry of Finance, Economic Planning and Development (Respondent). The dispute must relate wholly or mainly to one (or more) of the items/issues mentioned in paragraph (a)(i) above of the definition of "labour dispute". *Ex facie* the terms of reference before us, the dispute would relate to the amendment of the scheme of service for FO/SFO "to enable the grade of AFO -Assistant Financial Officer to be eligible for appointment to the grade of FO/SFO". The disputants in their latest amended Statement of Case refer to the role of the AFO having been

"reintroduced but with no promotional prospect" and conclude and pray that the scheme of service of FO/SFO be amended to enable AFO to be eligible for appointment as FO/SFO.

The legislator has not deemed it fit to include a specific definition of "promotion" in the Act. Bearing in mind that the definition of "labour dispute" in the Act has a lot to do with the jurisdiction of the Tribunal, the Tribunal finds that unless there is an indication to the contrary, "labour dispute" as defined should not be interpreted in a restrictive manner to limit the jurisdiction of the Tribunal. "Promotion" as used in the definition should thus not be restricted *stricto sensu* to an actual promotion exercise whether by way of selection or otherwise. A dispute which relates (underlining is ours) mainly to promotion of a worker may thus include a dispute which relates to the absence of promotion of a worker or absence of opportunity of promotion of a worker.

Also, the terms of reference of the dispute refer to a scheme of service. It is appropriate to refer to paragraphs 10.2 and 10.3 of the Pay Research Bureau Report 2016 (Volume 1) which read as follows:

Scheme of Service

10.2 A scheme of service is a legal document prescribed in accordance with regulations of the Service Commissions. It specifies the qualifications, duties, competencies, skills and experience required of the prospective job holder as well as the duties and responsibilities of a job. It also specifies the mode of recruitment/appointment and the salary attached to the grade.

10.3 The scheme of service is of vital importance in the management of human resource functions such as recruitment, promotion, performance management, training and development, job evaluation, design of pay structures, organisation design; and therefore the design or amendment to a scheme of service needs to be done with utmost care and in a timely manner. Delays in the prescription of schemes of service inevitably cause prejudice to the organisation, the employees concerned and disrupt the service delivery.

The scheme of service of a grade is closely related to the mode of recruitment/appointment or promotion to that grade and the Tribunal is of the view that, at this stage of the proceedings, and without hearing evidence, it is not possible for the Tribunal to find that the present disputes do not relate mainly to the promotion of the disputants.

It is apposite to note that the Tribunal (including the Permanent Arbitration Tribunal as the Tribunal was formerly called and the then Civil Service Arbitration Tribunal) has always been dealing with disputes involving schemes of service even though we hasten to add that the definition of "industrial dispute", as it was amended in the now repealed Industrial

Relations Act, was somewhat different from the current definition of “labour dispute” in the Act.

The Tribunal is not satisfied, at this stage that the dispute is not a labour dispute, and the objection taken under this limb is set aside.

As regards the second limb of the preliminary objection, the Tribunal finds that it is clearly premature in that the Tribunal has yet to hear evidence. Regulation 15 of the Public Service Commission Regulations provides as follows:

15 (1) The Commission shall, where a scheme of service is to be prescribed for a public office, consider and agree to the statement of qualifications and duties for, and, where appropriate, the mode of appointment to, the public office before the scheme of service is prescribed.

(2) Any scheme of service under paragraph (1) shall be prescribed by the supervising officer of the Ministry responsible for the civil service.

(3) The scheme of service shall specify the salary attached to, the qualifications required for and duties of, and, where appropriate, the mode of appointment to, the office to which it relates.

The Tribunal is fully aware of the role of Co-Respondent No 3 where a scheme of service is to be prescribed for a public office. This is in fact one of the main reasons why Co-Respondent No 3 has been joined as a Co-Respondent in the present case. The Tribunal when enquiring into the dispute, as required under section 70(1) of the Act, will be very cautious not to usurp the powers or jurisdiction of Co-Respondent No 3, or for that matter, of any other party. The Tribunal will refer to the case of **Government Servants' Association And The Master & Registrar & Anor, RN 298** where the Permanent Arbitration Tribunal stated the following:

“These proceedings have involved a number of institutions, including the Public Service Commission and we are grateful to all those concerned for their utmost cooperation. The Tribunal is conscious that it should not be seen as seeking to usurp the exclusive rights of other authorities. Our sole aim is and can only be industrial peace and the promotion of Justice.”

The Tribunal has wide powers and may, for example, in relation to any dispute or other matter before it, remit the matter, subject to such conditions as it may determine, to the parties for further consideration by them with a view to settling or limiting the several issues in dispute (section 6(2)(a) of the Second Schedule to the Act). Sections 6(2)(b) of the Second Schedule to the Act even provides as follows:

6. (1) …

(2) The Tribunal may in relation to any dispute or other matter before it –

(a) …;

(b) dismiss any matter or refrain from further hearing or from determining the matter, if it appears to the Tribunal that the matter is trivial, or that further proceedings are unnecessary, or undesirable in the public interest;

The Tribunal will have to ensure, when, and only if, it will have to deliver an award after hearing all the parties, that its award does not contain any provision inconsistent with any enactment in line with section 72(5) of the Act. This objection is, at best, premature and is set aside.

The third limb of the preliminary objections seems to have more to do with the merits of the case than with the jurisdiction of the Tribunal to even enquire into the dispute. Once the Tribunal is satisfied that a dispute falls within the definition of a labour dispute and is not expressly excluded from the jurisdiction of the Tribunal (under say section 71 of the Act), the Tribunal shall proceed with the matter. It is apposite to note that section 85(1) of the Act provides that "The Permanent Arbitration Tribunal established under section 39 of the repealed Industrial Relations Act is deemed to have been established under this Act and is renamed as the Employment Relations Tribunal." The functions of the Tribunal as per the Act include making awards (section 86 of the Act) and the Tribunal has been given wide powers to deal with labour disputes and other matters before it. Thus, under section 15 (of Part IV) of the Second Schedule to the Act, the Tribunal "*may conduct its proceedings in a manner it deems appropriate in order to determine any matter before it fairly and promptly and may deal with the substantial merits of such matter with a minimum of legal formalities*."

…

The Tribunal deals with employment relations matters and is given wide powers which are consonant with the settlement of labour disputes whilst it has also to uphold the principles and best practices of good employment relations. The Tribunal, for instance, is not bound by the law of evidence in force in Mauritius (section 20(1) (of Part IV) of the Second Schedule to the Act) and may, in the exercise of its functions in relation to a matter before it under the Act have regard to the principles of natural justice, the interests of the persons immediately concerned and the community as a whole and other principles (section 97 of the Act).

In the case of **U. Labourers of the Sugar and others vs P. Arbitration Tribunal and Ors 1976 MR 85**, the Supreme Court stated the following in relation to the then Permanent Arbitration Tribunal (now the Employment Relations Tribunal):

In considering whether the Tribunal has succeeded in its task, the Court, especially in the exercise of its powers of supervision by way of a prerogative order, should be chary of intruding usurpingly on the Tribunal's province. The Tribunal is by its constitution the main arbiter in the sphere of industrial relations. (underlining is ours) *It is, or is expected to become, with time and experience, an expert body in that sphere and as such should be left, as far as possible, to determine what is required for the implementation of the purposes of the Act and the fulfilment of its objects. Except, therefore, where the Tribunal has clearly misconstrued or misapplied a provision of the Act, this Court should refrain from interfering.*

The Tribunal observes that *ex facie* the latest amended Statement of Case of the disputants, the latter are not relying solely on alleged discrimination but are advancing rightly or wrongly other points such as the purpose of a scheme of service which is allegedly to assist in the development of employees to assume higher responsibilities or that the AFOs are the officers with relevant skills, experience, and expertise to become FO/SFO.

Bearing in mind our conclusion that the disputes are labour disputes as defined, and that the Tribunal is not prepared, at this stage of the proceedings and without having heard any evidence at all, to find that the disputes constitute disguised applications for Judicial Review and/or for constitutional redress, the Tribunal finds that the objection under this limb is at best premature. It is apposite to note that there is no direct averment either that the current disputes do not constitute other actions (other than constitutional redress) which were lawfully available to the disputants.

It is apposite to refer to the recent judgment of the Supreme Court in the case of **Mr Sebastien Teycheney v The Director of Private Secondary Education Authority & Anor 2021 SCJ 110**, where Mr Teycheney had sought leave to apply for Judicial Review of a decision of The Director of the Private Secondary Education Authority rejecting Mr Teycheney's request to adjust his salary. The Supreme Court stated the following:

With regard to the second limb of the objection, we need only reiterate that it is well-settled that judicial review is a remedy of last resort and that alternative remedies should therefore be exhausted before an application is made for leave to apply for judicial review. As rightly submitted by learned Counsel for the respondent and corespondent, the applicant, whose grievance is in substance that he has been discriminated against allegedly on the basis of creed in view of the treatment given to the six new Quality Assurance Officers, could therefore have lodged a complaint at the Equal Opportunities Commission or a case before the Employment Relations Tribunal.

The objections taken under this limb, as well as, the case law of the Supreme Court referred to us by Counsel for Respondent and which has been referred to in numerous

awards of the Tribunal (for example, **vide Central Statistical Office Staff Association And Government of Mauritius, RN 31/11**) that unless there had been a departure from established rules and procedures, it was not the function of the Court to direct Ministries or Government departments how schemes of service should be prepared or amended to suit the changing needs of society, are matters to be addressed on the merits of the case.

The Tribunal will have to hear evidence and in the light of same and any prayer being pressed can then decide on the merits of the case and the appropriateness of granting any award. If the Tribunal proceeds to make an award, it will obviously ensure that its award complies with section 72(5) of the Act. For the reasons given above, the Tribunal finds that the preliminary objections taken under this limb are premature and are set aside. For all the reasons given above, the Tribunal will proceed with the hearing of the cases on the merits.

SD Indiren Sivaramen

Vice-President

SD Francis Supparayen

Member

SD Rabin Gungoo

Member

SD Ghianeswar Gokhool

Member

11 May 2021