

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 34/2023

RULING

Before: -

Shameer Janhangeer	-	Vice-President
Francis Supparayen	-	Member
Rabin Gungoo	-	Member
Parmeshwar Burosee	-	Member

In the matter of: -

Mr Dhanrajsing RAMLUGUN

Disputant

and

AIR MAURITIUS LTD

Respondent

The present matter has been referred to the Tribunal for arbitration by the Commission for Conciliation and Mediation pursuant to *section 69 (9)(b)* of the *Employment Relations Act* (the "Act"). The Terms of Reference of the dispute read as follows:

Whether Air Mauritius should maintain my yearly pension contribution as it was previously at the rate of 3 to 5% as per Air Mauritius Ltd Pension Scheme (AMLPS) and also maintain my monthly Medical Scheme Contribution at the rate of 50% as per Air Mauritius Provident Fund Association (AMPA).

Both parties were assisted by Counsel. Mr N. Dookhit appeared for the Disputant and Mr D. Dodin appeared for the Respondent. The Disputant has submitted his Statement of Case,

whereas the Respondent has put in a Statement of Defence setting out Preliminary Objections while reserving its rights to file a Statement of Defence on the merits of the matter. The matter was thus argued in relation to the Preliminary Objections raised. Counsel for the Respondent has, at the outset of his arguments, stated that he shall not be insisting with the fourth ground of the Preliminary Objections whilst reserving his right to take same on the merits.

THE DISPUTANT'S STATEMENT OF CASE

The Disputant was continuously employed by the Respondent from 22 August 1984 to his retirement on 10 July 2011 and had occupied various positions at staff and managerial level. His contracts of employment made provision for entitlement to a monthly pension after retirement as per the Defined Benefits Scheme ("DB") under the Air Mauritius Ltd Pension Scheme ("AMLPS"). The AMLPS Rules (Rules 17 and 20) clearly stated at the time of his retirement in July 2011 that his pension will be increased yearly in January. He was also entitled to medical expense coverage as per the Air Mauritius Provident Fund Association ("AMPA"). The coverage made provision for 50% monthly contribution by the Respondent and 50% contribution by the Disputant as per the applicable AMPA Rules at the time of his retirement.

The Disputant has averred that as per a Circular dated 20 January 2022 from the Board of Trustees of AMLPS, he was informed that the yearly pension increases, as per the AMLPS Rules, have been amended *'by removing the revaluation for deferred pensions and reducing the annual pension increase in payment to a fixed rate of 0.25% p.a. with effect 31 December 2021'*. As a result of this decision, he is suffering a drop in his monthly pension effective 31 December 2021. He was also informed by the Secretary of the AMPA that, effective 1 December 2020, the Respondent was stopping its contribution made in his favour. This has brought a unilateral modification to the terms of his retirement regarding his medical coverage. Prior to the AMLPS's decision and even after the Circular, he sent legitimate queries to the Respondent, the Chairman of AMLPS and its Board of Trustees but has never received any response or acknowledgement.

The Disputant has also averred that it was through a letter dated 10 August 2022 from the then pension administrators, Swan, to which was attached a communique from AMLPS dated 29 July 2022, that he was informed that the AMLPS DB Fund had been bulk purchased by the National Insurance Company ("NIC") in a bulk annuity buyout at the expressed fixed annual increase rate of 0.25%. The APLMS communique also mentions that from 1 September 2022, the

Disputant's monthly pension has been commuted in the form of an Annuity Policy administered and paid via the NIC. There has been no communication exercise or transparency from the Respondent prior to the implementation of the changes/amendments to the rules which have impacted the terms and conditions of Disputant's retirement.

The Disputant has, on several occasions, drawn the Respondent's attention to express his concern and underline the prejudice being caused with regard to the decisions taken. The Respondent has failed to provide much needed clarifications, reassurances and remedy. As a result of the decisions taken, the Respondent is deemed to have failed to uphold its contractual and moral obligations and responsibilities towards the Disputant. The acts and doings of the Respondent are also causing prejudice to his standard of living. The Respondent has acted wrongfully and in contravention of the Disputant's contractual pension right and benefits as agreed and prevailing at the time of his retirement and should restore, with effect from 1 January 2022, the yearly pension increase of 3 – 5% in his favour as per the AMLPS formula applicable at the time of his retirement. The Respondent has also acted wrongfully and discriminatory in withholding its contribution towards the AMPA in favour of the Disputant and should restore this contribution with effect from 1 December 2020.

THE RESPONDENT'S STATEMENT OF DEFENCE

A. Preliminary Objections

1. The present dispute should be set aside by this Honourable Tribunal inasmuch as the award being sought by the Respondent is declaratory in nature bearing in mind the terms of reference of the dispute and the prayers sought by the Applicant at paragraph 15 of his Statement of Case.
2. This present dispute should be set aside by this Honourable Tribunal as the Statement of Case of the Applicant reveals no cause of action against the Respondent given that the decisions, which are being challenged by the Applicant, have not been taken by the Respondent.
3. The present dispute should be set aside by this Honourable Tribunal as it does not come within the definition of a "labour dispute" inasmuch as it does not relate "wholly or mainly to the wages, terms and conditions of employment of,

promotion of or allocation of work to, a worker or group of workers” but it is in relation to (1) the legality of an amendment made to the pension rules of a private pension scheme, the Air Mauritius Limited Pension Scheme (“AMLPS”), which is governed by the Private Pension Schemes Act 2012 (as amended), by virtue of its section 3(1)(a), and the rules of the said pension fund; and (2) the obligation of the Respondent to pay contributions to the Air Mauritius Provident Fund Association (“AMPFA”).

4. The present dispute should be set aside by this Honourable Tribunal as any alleged financial liability and/or obligation of the Respondent towards the Air Mauritius Provident Fund Association (“AMPFA”), as claimed by the Applicant, has been released, discharged and extinguished by virtue of the application of the Deed of Company Arrangement executed into on 1 October 2021.

THE ARGUMENTS OF COUNSEL

In relation to the first limb of the Preliminary Objections, Learned Counsel for the Respondent submitted that the Tribunal has, in various cases, referred to the declaratory nature of a dispute and that it does not make awards that are declaratory, hypothetical or academic in nature. The cases of *Air Mauritius Ltd v Employment Relations Tribunal* [2016 SCJ 103]; *Cotte and College de la Confiance* (ERT/RN 50/21); and *Ramma & Ors. and MITD* (ERT/RN 25/18 to 31/18) were relied upon. Any award would be binding on the Disputant and the Respondent but not on the AMLPS and the Provident Fund, who are not parties to this case. As the rules of the AMPLS have changed regarding the Respondent’s contribution, the award would be hypothetical and the same applies for the Provident Fund as averred at paragraph 7 of the Disputant’s Statement of Case. This does not mean that the Disputant is without any remedy and there is another forum as for the issues related to the pension fund.

Regarding the second limb of the Preliminary Objections, Learned Counsel stated that the decisions being challenged relate to the pension scheme regulated by the rules of the pension fund. It has not been averred that the amendments to the rules have been made by the Respondent. The alteration of the rules is governed by the *Private Pension Schemes Act 2012* and as per *section 29* of same, this is under the control, supervision and approval of the Financial Services Commission. It was submitted that the Respondent is no longer the employer but the

sponsoring employer under the scheme. There is therefore no cause of action against the Respondent.

In relation to the third limb of the Preliminary Objections, Learned Counsel for the Respondent notably referred to the definition of a labour dispute under *section 2* of the *Act*. He submitted that a former worker can only seize the Tribunal for matters concerning reinstatement following termination of employment but not for a dispute concerning wages, terms and conditions of employment, promotion or allocation of work. The contract of employment has ended. The contract now between the parties are the rules of the pension fund and the Provident Fund. This is separate to the contract of employment and is not amendable before the Tribunal. Counsel moreover referred to *section 72 (1)(e)* of the *Act* in support of his arguments as an award becomes an implied term of the contract of employment. As there is no contract of employment, there cannot be an implied term to the contract. This also links to the fact that an award would be hypothetical and academic as it cannot stand in law.

Learned Counsel for the Disputant replied to the arguments of the Respondent. In giving a factual background to the dispute, reference was notably made to paragraph 16 of the Disputant's last contract of employment dated 4 August 2008 titled '*Company Pensions Scheme*'. As per the rules governing the pension scheme, an increase of 3 to 5% was provided for. Reference was also made to a communique from AMLPS (Annex C to the Disputant's Statement of Case). However, Counsel could not point to any supporting documents in relation the medical scheme contribution.

In relation to the first limb of the Preliminary objections, Learned Counsel alluded to the wide powers of the Tribunal under *paragraph 6* of the *Second Schedule* of the *Act*. The Tribunal can also make a declaration in an interpretation of an award under *section 75* of the *Act*. He stated that the Disputant is not moving for a hypothetical order but wishes to be restored to his rights as it was. Disputant's rights were unilaterally changed by the Respondent as averred at paragraph 6 of the Statement of Case. It is a live issue and not hypothetical. Referring to Annex E of the Statement of Case, Counsel stated that whoever manages the pension is irrelevant and the mechanisms irrelevant in recognising that this not even part of the Terms of Reference.

Regarding the second limb of the Preliminary Objections, Learned Counsel for the Disputant submitted that the decision-making process is irrelevant. The Disputant has an

acquired right from which he has benefitted. He has to benefit from his pension which was applicable as from the time of his retirement.

On the third limb of the Preliminary Objections, Learned Counsel notably submitted that pensions are in fact deferred remuneration and should be included as a labour dispute under wages. In this respect, reference was made to the cases of *Tyack v Air Mauritius Ltd & anor.* [2010 SCJ 257] and *Lesage v Mauritius Commercial Bank Ltd & anor.* [2004 MR 63]. The contract of employment is over but the duty to pay the pension still prevails and this is with regard to the employer. No submissions were offered in relation to the dispute on the contribution to the medical scheme in relation to this particular objection.

THE TRIBUNAL'S CONSIDERATIONS

The Tribunal shall first consider the third ground of the Preliminary Objections raised by the Respondent inasmuch as this relates to the jurisdiction of the Tribunal to hear the present matter. The Respondent is contending that the dispute does not come within the definition of a labour dispute as it relates to the legality of the amendments made to the AMLPS rules and the obligations of the Respondent to pay contributions to the AMPA.

The Tribunal is empowered to enquire into a labour dispute that is referred to it under *section 69 (9)* of the Act or referred voluntarily by the parties pursuant to *section 63* of the Act (*vide section 70 (1)* of the Act). The Tribunal can only enquire into a labour dispute as is defined under *section 2* of the Act, the relevant part of which reads:

“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;*

The Tribunal must be therefore satisfied that the dispute before it is a labour dispute as defined in the Act before it embarks into an enquiry into the merits of the dispute. In *Davasgaium & Ors v Employment Relations Tribunal* [2022 SCJ 342], it was notably held:

... it was perfectly in order for the tribunal to determine whether the particular dispute referred to it fell under the definition of a "labour dispute" under the Act before it considered the merits of the dispute.

It has not been disputed, in the present matter, that the Disputant has reported the dispute as a former worker of the Respondent's. A careful reading of the Terms of Reference of the dispute reveal that the Disputant wishes to know whether the Respondent should maintain his yearly pension contribution at the rate of 3 to 5% as per the AMLPS and also maintain his monthly medical scheme contribution at the rate of 50% as per the AMPA. The dispute is in relation to two issues – firstly, the yearly pension contribution; and secondly, the monthly medical scheme contribution.

The Tribunal shall therefore consider each issue separately with regard to the objection raised under the third limb of the Preliminary Objections. Regarding the matter of the yearly pension contribution, it has not been disputed that this relates to pension. Despite the Respondent's contention that pensions do not fall under the definition of a labour dispute, the Disputant has argued that pension should be construed as wages in relying on Supreme Court cases of *Tyack (supra)* and *Lesage (supra)*.

The Tribunal takes note of the following from what was particularly held in *Tyack (supra)*:

Pensions is not a privilege. It is not a remuneration. It is not an allowance. It is not a bonus. It is a right which has been earned by a state of affairs; in this case by work over the years. In this sense, pensions have been referred to as deferred remuneration. What an employee has earned as his pension benefit is a right up until the termination of his contract for whatever reason he should obtain.

Likewise, it is apposite to note the following from the decision in *Lesage (supra)*:

*The accrued rights under the pension scheme may be regarded as rights separate from those which flow from the employment relationship and which are excisable or can be removed in specific circumstances. Pension entitlements are regarded as deferred remuneration from work that has already been carried out: see **Barber v Guardian Royal Exchange Society [1990] ICR 616.***

In the context of the present objection, the definition of wages under *section 2* of the Act must also be considered:

“wages” means all the emoluments payable to a worker under a contract of employment;

Although the Disputant’s last contract of employment dated 4 August 2008 (at Annex B of the Disputant’s Statement of Case) states at paragraph 16 that ‘*You will be covered by the Air Mauritius Limited Pension Scheme.*’, it is clear that the contract of employment is no longer in existence between the Disputant and the Respondent given that the former has retired since 10 July 2011. Moreover, Counsel for the Disputant in submissions clearly stated that the contract of employment is over although the right to a pension still remains.

Thus, the Disputant’s pension rights, although founded in the contract of employment, are covered by the AMLPS and its applicable rules. It would therefore be apposite to note the following from the decision in *Lesage (supra)*:

There is enough case-law which have held that pensions, unlike other benefits afforded to employees, are rights which exist independently of contracts of employment. The case of Air Jamaica Ltd v Joy Charlton [1999] 1 WLR 1399 decides that as with share schemes, the rights of employees to pension benefits may be separate from the contract of employment and the terms of the Pension Scheme govern the employees’ entitlement. Lord Millet in the case pointed out that it was unusual for the pension scheme to exist as a contract between employer and employee and that the usual scheme involved the operation of the pension through a trust scheme.

(The underlining is ours.)

The Disputant’s contract of employment dated 4 August 2008 does not mention any other matter on the issue of pension save for paragraph 16. There is certainly no mention of any yearly increase to the pension in the contract of employment as this has been provided in the AMLPS rules, notably at rule 17, as averred at paragraph 4 (i) of the Disputant’s Statement of Case. It is therefore clear that the pension being paid to the Disputant emanates from the AMLPS, of which the Respondent is the sponsoring employer (*vide* Communique from AMPLS dated 20 January 2022 at Annex C to the Disputant’s Statement of Case), and is not being paid under the contract of employment, which makes no express mention of any payment of a pension to the Disputant.

Thus, bearing in mind the definition of wages under the *Act*, the pension does not amount to emoluments being paid to the Disputant under the contract of employment. Moreover, as noted from *Tyack (supra)*, it was clearly held that pension is not remuneration despite it being described as deferred remuneration.

The Tribunal has also duly noted that an award becomes an implied term of the contract of employment between the worker and the employer to whom the award applies (*vide section 72 (1)(e)* of the *Act*). However, as the contract of employment is no longer in existence and the Disputant no longer being in employment, any eventual award cannot possibly become an implied term of the Disputant's contract of employment.

The dispute regarding the yearly increase in the Disputant's pension cannot therefore be deemed to be a labour dispute pursuant to *section 2* of the *Act* under the heading of wages as is being contended by the Disputant. Nor can it fall under the other items of the definition of a labour dispute under the *Act*.

The Tribunal must also determine whether the second issue of the Terms of Reference, i.e. maintaining the medical scheme contribution, amounts to a labour dispute. The Disputant's last contract of employment dated 4 August 2008 notably provides, at paragraph 12, that '*The Air Mauritius Ltd Provident Fund Association provides financial assistance for the medical treatment of its members and their dependents.*'. The contract is silent as to any contribution that the Respondent, or even the Disputant, is to make as to this scheme.

It has been averred, at paragraph 4 (ii) of the Disputant's Statement of Case, that the medical coverage at the time of the Disputant's retirement made provision for 50% monthly contribution by the Respondent as per applicable AMPA rules. It has also been averred that the Secretary of the AMPA informed the Disputant that effective 1 December 2020, the Respondent was stopping the employer's contribution in his favour. However, there are no documents annexed in support of these two averments in the Statement of Case.

Would this matter of the maintaining the Respondent's contribution to the medical scheme fall within the definition of a labour dispute under the *Act*? As previously noted, the Disputant is no longer in employment and has brought the present dispute as a former worker, having been retired since 2011. The issue cannot therefore be deemed to be one which relates wholly or mainly to terms and conditions of employment of the Disputant, nor has it been argued to be so on his behalf. The other items of the definition of a labour dispute (namely wages, promotion, and allocation of work) do not find any application to the issue at hand.

The Tribunal cannot therefore conclude that the dispute relating to whether the Respondent should maintain the Disputant's monthly medical scheme contribution is a labour dispute as defined under the *Act*. The Tribunal therefore finds that the Respondent's third Preliminary Objection is well taken and must succeed.

Under the second Preliminary Objection, the Respondent is contending that there is no cause of action against the Respondent inasmuch as the impugned decisions being challenged by the Disputant have not been taken by the Respondent.

Regarding the first limb of the dispute concerning maintaining the yearly pension contribution as it was, the Disputant has clearly averred, at paragraph 5 of his Statement of Case, that he was informed by a Circular dated 20 January 2022 (at Annex C of the Statement of Case) that the yearly pension increase in the AMLPS Rules have been amended. A perusal of this document notably reveals that the Board of Trustees of the Air Mauritius Limited Pension Scheme have amended the rules of the DB Section. Thus, the decision to amend the rules of the pension scheme is that of its Board of Trustees and not the Respondent. It is also incorrect for the Disputant to have averred that this is a unilateral decision of the Respondent's when the Circular dated 20 January 2022 clearly does not state so.

Regarding the medical scheme contribution aspect of the Terms of Reference of the dispute, it has notably been averred that the Disputant's medical expenses coverage is as per the AMPA, which at the time of his retirement made provision for 50% monthly contribution by the Respondent and 50% contribution by himself as per the applicable AMPA rules (*vide* paragraph 4 (ii) of the Disputant's Statement of Case). However, the relevant rules have not been reproduced in the Disputant's Statement of Case or annexed thereto.

It has also been averred, at paragraph 7 of the Disputant's Statement of Case, that the Disputant was informed by the Secretary of the AMPA that, effective 1 December 2020, the Respondent was stopping the employer's contribution in his favour. Despite this averment, there are no documents supporting how the Disputant was so informed by the Secretary of the AMPA. The Tribunal cannot therefore reasonably conclude that it was the Respondent's decision to stop the employer's contribution in favour of the Disputant or otherwise.

Although Counsel for the Disputant has contended that the decision-making process is irrelevant and that the Disputant must benefit from his pension applicable at the time of his retirement, he could not point out where the decisions being challenged have been taken by the Respondent or on its behalf. The Disputant has reported the present dispute against the Respondent and to substantiate a valid cause of action against the latter, the impugned decisions must at the very least come from the Respondent. If not, the proceedings would be deemed to be frivolous.

The Tribunal would also wish to make a pertinent observation on the accuracy of Terms of Reference of the dispute. The terms firstly refer to whether the Disputant's yearly pension contribution should be maintained as it was previously. However, as per the averments of his Statement of Case, notably the prayer at paragraph 15 (i), the Disputant is seeking the restoration of the yearly pension increase of 3 - 5% in his favour. Likewise, the second aspect of the Terms of Reference refers to maintaining the Disputant's monthly medical scheme contribution at the rate of 50%. This is in contrast to the prayer, at paragraph 15 (ii) of his Statement of Case, whereby the Disputant is asking that the Respondent restores its contribution towards AMPA in his favour.

Having notably found that the dispute as per its Terms of Reference does not come within the definition of a labour dispute as defined under the *Act* and having also considered the second ground of the Preliminary Objections, the Tribunal does not find it necessary to consider the first ground of the Preliminary Objections raised.

The matter is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

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SD Francis Supparayen
(Member)

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SD Rabin Gungoo
(Member)

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SD Parmeshwar Burosee
(Member)

Date: 19th July 2023

