

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

Before:

Shameer Janhangeer	-	Vice-President
Christian Bellouard	-	Member
Abdool Feroze Acharauz	-	Member
Renganaden Veeramootoo	-	Member

In the matters of:-

ERT/RN 293/11

Mr Vimal Moneeram

Disputant

and

Mauritius Telecom Ltd

Respondent

ERT/RN 294/11

Mr Remy Celestin

Disputant

and

Mauritius Telecom Ltd

Respondent

The present matters have been referred to the *Tribunal* for arbitration on the following similar terms of reference:

Whether the Disputants (i.e. V. Moneeram and R. Celestin) should be employed "on establishment", i.e. on a permanent basis and/or whether the employment of the Disputants amount to be "on establishment".

The *Disputants* are contractual employees at Mauritius Telecom Ltd (the *Respondent* Company). Mauritius Telecom Ltd is one of the leading companies in Mauritius being the primary telecommunications operator and service provider of the island.

Both parties were represented by Counsel, who have each filed a statement of case common to both cases. The *Respondent* has also filed a supplementary statement of case in the matter. Both cases have been consolidated with the consent of the parties.

The *Disputants* have averred in their statement of case that they were initially employed as technical assistants on 9 June 2006 for a period of six months with a verbal promise that subject to satisfactory performance, they would be employed on a permanent basis. Their contracts were on 26 December 2006 renewed for a further period of six months. It has notably been averred that between December 2007 and November 2010, the *Respondent* on no less than three occasions informed the *Disputants* that their contract of employment were allegedly being renewed for various periods ranging from one year to five years when in fact the *Disputant* had been employed under one or more than one agreement since June 2006 without any gap lasting more than 28 days till the present day. The *Disputants* contend to be deemed to be in the continuous employment of the *Respondent* as provided under the *Employment Rights Act 2008* and as such their employment being permanent amounts to be on the establishment of the *Respondent*.

The *Respondent* also submitted a statement of case in the matter. The *Respondent* has denied that the *Disputants* were verbally promised that they would be employed on a permanent basis. The statement of case has also listed the fixed term contract and the renewal of the contract of employment of the *Disputants*. The various contracts have been annexed to the statement of case (Annexes 1 to 5). Also annexed to the statement of case are two letters dated 23 November 2010 and 26 December 2011 (Annexes 6 and 7) wherein new contracts were at each time offered to the *Disputants*, who refused same within the prescribed time limit imparted. It has further been averred that the *Disputant's* last contract of employment which started on 1 January 2009 has expired on 31 December 2011.

In its supplementary statement of case, the *Respondent* has averred that the last contracts of employment of the *Disputants* have now been extended for a further six months starting on 1 January 2012 and ending on 30 June 2012 with the other current terms and conditions of the contract remaining unchanged. The *Disputants* have accepted same and have resumed duty.

Mr V. Moneeram was called to depone on behalf of both *Disputants* by Counsel. Mr Moneeram stated that he joined the *Respondent* as technical assistant in 2006 on a six months contract, prior to which he went for an interview where the Senior Human Resource Manager Mr S. Puddoo and Mr Dwarka were present. During the interview they asked if

they will be employed in the job or not, to which they were replied positively, there will be a six months contract and six months probation then they will be employed. They signed the initial six months contract when they started. The *Disputant* understood that they will be employed in twelve months' time if their probation is satisfactory. He received a letter in December 2006 stating that his contract will be renewed for another six months. However, he did not receive a letter that he would be employed for another six months ending on 31 December 2007 but the other *Disputant* Mr Remy Celestin did receive same. In 2008 he received a paper stating that he has been offered a three year contract ending on 31 December 2011. He did not feel satisfied and complained to the Ministry of Labour in June 2010 following which the case went to the *Commission for Conciliation and Mediation* and this has now come to the *Tribunal*. His contract has expired on 31 December 2011. On 3 January 2012, he was offered a five year contract. He was told that his contract had expired and that if he does not sign the contract, which would start on 29 January, he can leave the company. He filed a complaint of unjustified dismissal at the *Labour Office*. Thereat, the *Disputant* refused to sign the contract starting on 29 January and the *Respondent* submitted a letter through the *Ministry of Labour* to the effect that they were extending the old contract. He maintained that twice they were offered a five year contract and that they never wanted to sign same. He further stated that there was no interruption between the different contracts he worked under as stated in the *Disputants'* statement of case.

Under cross-examination from Counsel for the *Respondent*, Mr Moneeram stated that he received a letter dated 9 June 2006 (Annex I of the *Respondent's* statement of case) from the *Respondent* wherein he was offered a contract as technical assistant on the terms and conditions stated therein, signed and accepted same on 12 June 2006; he repeated that Mr S. Puddoo verbally told him that they will be employed; he agreed that the contract was not verbal but in writing; he stated that he did not receive another letter renewing his contract for another six months from 1 July 2007 to 31 December 2007 (Annex 3 of the *Respondent's* statement of case) and has maintained same throughout cross-examination; he did receive the letter dated 23 December 2008 (Annex 5 of the *Respondent's* statement of case) wherein he was offered a three year contract starting 1 January 2009, which was a shock to him as he was promised that he would be employed; he did receive a revised contract dated 23 November 2010 (Annex 6 of the *Respondent's* statement of case) but he did not sign same; he also stated that since 2006, nothing has been signed; he agrees that it has been stated in his statement of case (at paragraph 3) that between December 2007 and November 2010 the contract of employment was renewed for various periods; he also stated and maintained that he did not receive the letter dated 24 December 2007 (Annex 4 of the *Respondent's* statement of case); he further stated that he cannot say anything on whether there are two categories of employees at Mauritius Telecom, i.e. those on establishment and those on contract; he agreed to a three year contract when he received the letter in December 2008, then negotiations started with management; he stated that he received a letter a year and a half after (being initially employed) and then negotiations

started with management; however he denied that Mr Puddoo never made any verbal arrangements with him and that his conditions of work with Mauritius Telecom is in the letters and the documents he received.

Under re-examination, Mr Moneeram stated it is normal for him to want to be on the pensionable establishment of the Mauritius Telecom and that this is his fight. He also stated that he was working without any renewal of his contract after one year and as they were promised, they thought that things would be positive.

The *Respondent* through its Counsel called Mr S. Puddoo, Head of Human Resources, to adduce evidence on its behalf. Mr S. Puddoo confirmed that the *Disputants* were recruited in 2006 as technical assistants on an initial six months contract and were also given initial training; he denied that there were any interviews as referred to by Mr Moneeram; with regard to the interview referred to by the Mr Moneeram, Mr S. Puddoo stated that in fact it was the day that Mr Dwarka met with the '*offerees*' to make the offer; the *Disputants* were offered a six months contract and there has never been any offer that they will be subsequently employed on the permanent establishment; he confirmed that the contract was renewed on several occasions; the *Disputants* did make representations to the effect that they should be employed on the permanent establishment and such representations were also made to the *Ministry of Labour* and eventually to the *Commission for Conciliation and Mediation*; he is mandated by his board to employ on fixed term contract and cannot offer or imply that employees on fixed term contract will be employed on establishment terms; he does not agree to having verbally told Mr V. Moneeram that they will be employed; he also confirmed that at the end of their three year contract in December 2011, the *Disputants* were offered a five year contract with enhanced conditions which they refused while other technical assistants accepted same; and furthermore they decided to extend the contract which expired on 31st December 2011 for a further six months, which was accepted by the *Disputants*.

Under cross-examination from Counsel for the *Respondent*, Mr S. Puddoo notably stated that the *Respondent* Company employs about twenty technical assistants on fixed term contracts, with none being on the permanent establishment as the position does not exist on the permanent establishment; the activities of the *Respondent* Company require their employment; he cannot give a comparison of whether the conditions of employment that are found in fixed term contracts are inferior to those in contracts on the permanent establishment as the position does not exist on the permanent establishment; and he agreed that it was the intention of management to bring the termination of the *Disputant's* employment, however it was made clear to them that they would be subsequently employed on a new contract.

Both parties have put in written submissions in both cases.

Counsel for the *Disputants* has notably submitted referring to the now repealed *Labour Act* which provided that that contract of fixed duration when renewed on several occasions will transform themselves into one contract of indeterminate duration. This provision is presently in force in the *Employment Rights Act 2008*. Counsel has also cited French jurisprudence in support. On the issue of whether continuous employment would amount to being on the permanent establishment, Counsel went on to submit in referring to the dictionary meanings of the terms “continuous” and “permanent” that permanence without continuity or continuousness is impossible and that it can logically be asserted that, if the *Disputants* are deemed to be in the continuous employment of the *Respondent* as provided for in the *Employment Rights Act*, then it follows that they are in the permanent employment of the employer.

Counsel for the *Respondent* has mainly submitted that the *Disputants* were employed under specific contracts of fixed term durations with continuity of employment since June 2006. There is no provision in the law to compel the *Respondent* to admit the *Disputants* on its permanent pensionable establishment where the post of technical assistant does not exist. Further, it would be contrary to the provisions of the contract freely entered by the parties to vary an essential condition at the request of only one party.

The terms of reference of the present dispute comprises of two limbs, set out as follows:

- (i) *whether the Disputants should be employed on “establishment”, i.e. on a permanent basis; and/or*
- (ii) *whether the employment of the Disputants amount to be on establishment.*

With regards to the first limb of the point in dispute, although the *Disputants* have contended that they have been in the continuous employment of the *Respondent* Company since June 2006 and that the *Respondent* has not denied that the *Disputants* were employed under specific contracts of fixed term duration with continuity of employment since June 2006, the *Tribunal* has found the evidence of the representative of the *Respondent* Company to be of much significance on this issue.

Mr S. Puddoo was very clear in stating that he never told either of the *Disputants* that they would subsequently be employed on the permanent establishment and that he was mandated by the Board of the *Respondent* Company only to offer employment of fixed term contracts. He further went on to state, when under cross-examination, that the post of technical assistant does not exist on the permanent establishment of the *Respondent* Company.

Furthermore, the *Tribunal* has noted from the various contracts of employment of that have been annexed to the *Respondent's* statement of case that it has never been expressly stated that the *Disputants* would be employed on the permanent and pensionable establishment of the *Respondent* Company. In contrast, the recent fixed term contract of employment of five years offered to the *Disputants* on 26 December 2011 (Annex 7 to the *Respondent's* statement of case) and which was expressly refused by the *Disputants* contained a clause that the aforesaid contract would not confer any right on the employee to join the permanent and pensionable establishment of the *Respondent* Company.

In disputes between employers and employees, the inherent power of the employer to organise its business cannot be overlooked. In *Hong Kong Restaurant Group Ltd v Manick* [1997 SCJ 105], the following was noted:

It must be borne in mind that the employer has the inherent power of administration and he can organize his business according to the exigencies of the service but within the labour law and its remuneration orders.

More recently, in the case of *Dyers and Finishers Ltd. v Permanent Arbitration Tribunal &ors.* [2010 SCJ 176], the following was stated in relation to the employer – employee relationship:

... the employer is at liberty to organise his enterprise in the best interest of that enterprise. But he must also comply with the law of the country with respect to the rights of the employees.

The *Tribunal* has also however noted that the representative of the *Respondent* Company has acknowledged that the activities of the company require the services of technical assistants. Although, in employing the *Disputants* it has been made clear that there was no intention for them to be subsequently employed on the permanent establishment, the *Tribunal* would urge the parties, notably the *Respondent* in this matter, in view of principles and best practices of good employment relations to consider the employment of the *Disputants* on a permanent and pensionable basis having regard to their continuity of employment with the *Respondent* Company since 2006 and the essential nature of their services to the activities of the *Respondent*.

With regard to the second limb of the dispute, the *Disputants* are contenting that they are in the continuous employment of the *Respondent* Company since June 2006. As per section 2 of the *Employment Rights Act 2008*, the term “*continuous employment*” is defined as:

the employment of a worker under an agreement or under more than one agreement where the interval between an agreement and the next does not exceed 28 days;

From the evidence adduced, it is clear that the *Disputants* have been in the continuous employment of the *Respondent* since 09 June 2006 having been employed under five fixed term contracts between 09 June 2006 and 31 December 2011. They are presently employed under an extension ending 30 June 2012 to their previous contract of employment dated 23 December 2008.

The contention of Counsel for the *Disputants* is that if they are deemed to be in the continuous employment of the *Respondent* Company it must follow that they are in the permanent employment of the latter. In his written submissions, learned counsel has cited *section 30(2)* of the now repealed *Labour Act* as well as French jurisprudence to advance that the renewal of a fixed term contract on several occasions leads to a contract of indeterminate duration. This argument has not been wholly disputed by learned counsel for the *Respondent*, who in his written submissions, has cited the judgment of *Mauritius Steam Navigation Co Ltd v Roussety* [1977 MR 25] for the proposition that when a contract for a definite period is renewed tacitly for several periods of fixed duration the number of which is indeterminate, the total duration of the contract will also be indeterminate.

In *Droit du Travail, Volume 2 Rapports Individuels, 16^e édition, Dalloz* one can note the following in relation to a *contract à durée déterminée* (p.57):

*Le contrat à durée indéterminée est un **contrat d'exception**, l'art. L. 1221-2 C. trav. Disposant que « le contrat de travail à durée déterminée est la forme normale et générale de la relation de travail ». Sans durée précisée, le contrat de travail est présumé avoir une durée indéterminée.*

Under the *Employment Rights Act 2008*, the fixed term contract of employment is recognised under *section 5(3)*, which provides:

Any agreement may be entered into for a specified type of work or for a specified period of time.

In *Sadien v The Trust Fund for the Social Integration of Vulnerable Groups* [2009 SCJ 400], the following was stated in relation to fixed term contracts of employment:

A contract for a specific task is therefore but one of the two possible “contrats à durée déterminée”. It comes to an end with the allotted task coming to an end whereas the present contract falls under the first limb i.e. amongst the category of contracts for a specific period and coming to an end on the last day agreed upon.

More importantly, in the Mauritian context, the following has been noted by *Dr. D. Fok Kan* in *Introduction au droit du travail mauricien, 2^{ème} édition* (at page 504) in relation to the subject of the *contrat à durée déterminée*:

Quant à son régime juridique, le législateur n'a prévu que des règles par rapport à l'extinction et la rupture des contrats à durée déterminée.

However, on the subject of whether a contract of fixed term duration can become a contract of indeterminate duration, one may also be guided by *Dr. D. Fok Kan (supra, at page 505)*:

Cette requalification se justifie par le fait que l'employeur, ayant laissé la tacite reconduction s'opérer, est probablement indifférent quant à la durée du contrat. On peut ainsi penser que cette requalification ne trouvera pas son application là où il y a un renouvellement exprès par les parties justifiant ainsi le choix du contrat à durée déterminée.

Moreover, from *Dalloz (supra)*, the following can be noted in relation to the *regime des contrats à durée déterminée (p. 58)*:

A priori une succession de contrats de remplacement ou de contrat saisonniers ne crée pas de relation durable à caractère indéterminé. Toutefois le juge doit prendre en considération la réalité d'une relation globale ressortant des circonstances et alors constater l'existence d'une relation contractuelle à durée indéterminée, à laquelle s'appliqueraient les règles du licenciement (jurisprudence classique).

However, one must also not lose sight of what was stated in relation to the renewal of contract of employment of fixed term duration in *Mauritius Steam Navigation Co Ltd v Roussety [supra] (at page 33)*:

... it was the common will of the parties that the contract would be renewed at each date of expiry for an indeterminate number of times.

Furthermore, in the case of *Sadien [supra]*, the Supreme Court held that each of the contracts of employment of the appellant was autonomous and it could hardly be said that the contracts had turned into one of indeterminate duration because of four successive renewals.

In relation to the responsibilities of the individual worker, the *Tribunal* wishes to draw the attention of the parties to *paragraphs 40 and 41* of the *Code of Practice* in the *Fourth Schedule* of the Act. The aforesaid *paragraphs* provide as follows:

40. The individual worker has obligations to his employer, to the trade union to which he belongs and to his fellow workers. He shares responsibility for the state of employment relations in the establishment where he works and his attitudes and conduct can have a decisive influence on them.

41. Every worker shall –

- (a) *satisfy himself that he understands the terms of his contract of employment and abide by them; and*
- (b) *make himself familiar with any arrangements for dealing with grievances and other questions which may arise out of his contract of employment, and make use of them as and when the need arises.*

On the facts of the present matter, the contract of employment between the *Disputants* and the *Respondent* Company has been expressly renewed by the employer on no less than four occasions prior to the referral of the dispute before the *Tribunal*. This is not a case which has seen the operation of “*tacite reconduction*” (which is recognised under *section 36(2)* of the *Employment Rights Act 2008* and which is a re-enactment of *section 30(2)* of the repealed *Labour Act*) in the renewal of the contract of employment.

Furthermore, it should be noted that the contract of employment of the *Disputant* does not confer an automatic right of renewal upon its termination date in as much as the contract does expressly provide that it would be renewed upon satisfactory work performance and conduct.

It is thus clear that from the evidence adduced in the present matter that there was never any intent on the part of the employer to employ the *Disputants* on its permanent establishment or to confer an automatic right of renewal of the contract of employment upon its expiry. There was therefore no mutual intention between the parties for the contract of employment to be of an indeterminate duration.

The *Tribunal* thus cannot find the employment of the *Disputants* to amount to be on the establishment of the *Respondent*.

The dispute in both cases is therefore accordingly set aside.

(SD) Shameer Janhangeer
(Vice-President)

(SD) Christian Bellouard
(Member)

(SD) Abdool Feroze Acharauz
(Member)

(SD) Renganaden Veeramootoo
(Member)

Date: 25 May 2012

