EMPLOYMENT RELATIONS TRIBUNAL

RULING

RN70/13

Before

Indiren Sivaramen **Vice-President**

Raffick Hossenbaccus **Member**

Desire Yves Albert Luckey **Member**

Renganaden Veeramootoo **Member**

In the matter of:-

Mr Suraj Dewkurun (Disputant)

And

Gamma Materials Ltd (Respondent)

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

"Whether I, Mr Suraj Dewkurun should be reinstated at Gamma Materials Ltd as from 11 January 2012."

The Disputant and the Respondent as represented have not been able to reach an agreement. The Tribunal thus proceeded to hear arguments from counsel on a preliminary objection taken on behalf of the Respondent to the effect that:

1. *The Employment Relations Tribunal does not have jurisdiction to hear the present application.*

2. *The present application cannot be entertained by The Employment Relations Tribunal in as much as the Applicant voluntarily resigned from his post at Gamma Materials Ltd on the 11th of January 2012 (Annexure A) and therefore the Applicant was not an employee at the time when he reported a dispute to the President of the Commission for Conciliation and Mediation under s. 64(1) of the Employment Relations Act 2008 on 20th February 2013.*

3. The Applicant cannot proceed with the present application in as much as:

a. The purported dispute reported is not a labour dispute.

b. The report was made on behalf of the Applicant who is not entitled to be a party to the labour dispute in as much as the Applicant was not an employee at the time the report was made.

c. The dispute, if any, between the parties relate to an issue which is within the exclusive jurisdiction of the Industrial Court i.e alleged constructive dismissal.

4. The Respondent therefore moves that the present application be set aside.

Counsel for Respondent argued that the starting point for the case is a resignation letter so that there is no employer and employee relationship in the present matter. He added that the case is wrong *ab initio*. He referred to the cause of action and remedy sought. According to him, the Disputant was requesting the Tribunal to find that he had been wrongfully or constructively dismissed so that his remedy would lie at the Industrial Court and not this Tribunal. He also referred to the definition of "labour dispute" and argued that the term 'reinstatement" found therein could not apply to someone who had resigned. He argued that the dispute would not even satisfy the definition of "labour dispute" and moved that the case be set aside.

Counsel for Disputant argued that the objection had been taken without any basis and was futile and misconceived. He agreed that the Tribunal was not the forum for 'constructive dismissal' but stated that the Disputant was not seeking compensation for the constructive dismissal. He stressed on the terms of reference and argued that the Disputant was seeking reinstatement. He added that the CCM has not rejected the dispute and has instead referred the matter before the Tribunal. Counsel referred to the circumstances in which the resignation would have been given and added that such circumstances are hotly disputed. Then, curiously he again conceded that it would be for the Industrial Court to consider same and added that things would not have reached such a state if Disputant had not been deprived of his rights under sections 36, 37 and 38 of the Employment Rights Act. He agreed that the Disputant submitted his resignation letter but stated that the circumstances in which same was done must be considered. The Tribunal has, according to him, jurisdiction under section 72 of the Employment Relations Act to award whatever compensation it thinks fit.

The Tribunal has examined the arguments of both counsel. Section 3 of the Industrial Court Act provides as follows:

"*There shall be an Industrial Court with exclusive civil and criminal jurisdiction to try any matter arising out of the enactments specified in the First Schedule, or of any*

regulations made under those enactments, and with such other jurisdiction as may be conferred upon it by any other enactment."

The Employment Rights Act 2008 has repealed the Labour Act which is mentioned in the First Schedule to the Industrial Court Act. The Employment Rights Act 2008 clearly provides that the said Act is to revise and consolidate the law relating to employment and contract of employment or contract of service. The Labour Act applied to every contract of employment (subject to any provision to the contrary in any other enactment) until it was repealed on 2 February 2009 by the Employment Rights Act 2008. Part VI of the then Labour Act referred to 'Termination of Agreements' and included provisions such as 'termination of agreement' (section 30), 'notice of termination of agreement' (section 31) and 'unjustified termination of agreement' (section 32). The Employment Rights Act 2008 under Part VIII bearing the heading 'Termination of Agreement' re-enacted similar provisions, that is, 'termination of agreement' (section 36), 'notice of termination of agreement' (section 37) and 'protection against termination of agreement' (section 38). Though there was no express transitional provision for the reference to Labour Act (which had been repealed) in the First Schedule to the Industrial Court Act to be construed as reference to the Employment Rights Act, the intention of the legislator is clear however following the enactment of the Employment Rights Act 2008 (and repeal of the Labour Act) and bearing in mind section 18 of the Interpretation and General Clauses Act (re-enacted provisions). The reference to the repealed Labour Act in the First Schedule to the Industrial Court Act was to be construed as a reference to the Employment Rights Act. The Tribunal finds support for this interpretation inasmuch as the recent amendment brought by the Employment Rights (Amendment) Act 2013 (used as guidance) provides the following:

38. Consequential amendments

(1) A reference in any enactment to the repealed Labour Act or a section thereof shall be construed as a reference to the Employment Rights Act or the corresponding section thereof.

….

The Industrial Court thus has exclusive jurisdiction to try any matter arising out of the Employment Rights Act. This is supplemented by section 71 of the Employment Relations Act which provides as follows:

71. Exclusion of jurisdiction of Tribunal

The Tribunal shall not enquire into any labour dispute where the dispute relates to any issue-

(a) within the exclusive jurisdiction of the Industrial Court;

(b) which is the subject of pending proceedings before the Commission or any court of law.

The issue of reinstatement following the termination of a contract of employment by an employer has already been considered by the Tribunal (**vide Mr Sheryad Hosany v Cargo Handling Corporation Ltd RN 40/13** and **Miss Mahentee Boolakee v Central Electricity Board RN 10/13**). Part VIII (Termination of Agreement) of the Employment Rights Act includes sections 36, 37 and 38 of the said Act which, according to Counsel for the Disputant, have been breached in the case of Disputant. These are matters to be thrashed out before the Industrial Court. We will refer again to the Employment Rights (Amendment) Act 2013 for guidance. In the case of **Mr Sheryad Hosany (above)**, the Tribunal stated the following:

One of the objects for the amendments to the law, as stated on the Explanatory Memorandum to the Employment Rights (Amendment) Bill which later became the Employment Rights (Amendment) Act 2013, was with a view to "introducing the concept of reinstatement in cases of unfair termination of employment on grounds of redundancy, discrimination and victimisation for participation in trade union activities."

"Reinstatement" in former employment may now be ordered following the recent amendments brought to the law. However, such an order may only be made in a limited number of cases. Section 46 (5B) ***(above)*** *provides that the Industrial Court may where it finds that the termination of employment of a worker, who has been in continuous employment for a period of not less than 12 months with an employer, is effected on the ground of the worker's race, colour, caste, national extraction, social origin, pregnancy, religion, political opinion, sex, sexual orientation, HIV status, marital status or family responsibilities or by reason of the worker becoming or being a member of a trade union or otherwise participating in trade union activities, the Court may, with the consent of the worker, order that that worker be reinstated in his former employment.*

Though we bear in mind that this dispute was reported to the CCM on 20 February 2013 (as per the letter of referral), that is, before the coming into force of the Employment Rights (Amendment) Act 2013 on 11 June 2013, there is nothing to suggest that the Tribunal had jurisdiction prior to those amendments to order reinstatement following the termination of a contract of employment/service. Indeed, under section 71 of the Employment Relations Act 2008 the Tribunal could not enquire into any labour dispute where the dispute relates to any issue within the exclusive jurisdiction of the Industrial Court. The Tribunal thus in the case of **Mr Sheryad Hosany (above)** stated the following in relation to the term "reinstatement" as mentioned in the definition of 'labour dispute' at section 2 of the Employment Relations Act :

The only plausible interpretation of the words "reinstatement or suspension of employment of a worker" in the definition of "labour dispute" at section 2 of the Employment Relations Act would thus be that they relate to claims for reinstatement following a suspension or following a "rétrogradation" which may be a form of

disciplinary sanction and whereby the disputant before the Tribunal would be seeking reinstatement in his former post. Such an interpretation would also be in line with the "in pari materia" canon of statutory interpretation where the meaning of an ambiguous statute may be determined in light of other statutes on the same subject matter (The Employment Rights Act and Industrial Court Act).

The Tribunal added the following:

Reinstatement in one's former employment is provided for, as stated above, only in a few specific cases under the Employment Rights Act itself and apart from cases of reduction of work force, it is our view that the Tribunal has no jurisdiction to order reinstatement of a worker in his former employment. As rightly pointed out by Counsel for Respondent, such a dispute would involve considering the fairness of the dismissal, the procedure adopted and the reasons put forward by the employer for the dismissal. This is beyond the jurisdiction of the Tribunal which has only been given jurisdiction (with the new amendments to the law) in relation to termination of a contract of employment where there is reduction in workforce.

It is apposite to note that the legislator whilst enacting the Employment Relations Act 2008 which has repealed the former Industrial Relations Act has brought amendments to the definition of disputes which may be heard before the Employment Relations Tribunal (as renamed from the former Permanent Arbitration Tribunal). "Industrial dispute" under the old Industrial Relations Act meant a dispute between an employee or a trade union of employees and an employer or a trade union of employers which relates wholly or mainly to […] the termination or suspension of employment of an employee. In our view, the word 'termination' had been deliberately removed from the definition of 'labour dispute' in the Employment Relations Act 2008 (the obvious reason being to avoid conflicts of jurisdiction) so that the last part of the definition would read "reinstatement or suspension of employment of a worker".

Also, if the Tribunal was to find that it had jurisdiction prior to The Employment Rights (Amendment) Act 2013 to order reinstatement of a worker in the case of termination of a contract of employment, this would lead to absurd results. Indeed, the Employment Rights (Amendment) Act 2013 would be wrongly interpreted as now restricting the right of workers for reinstatement in only a few specific cases where termination is effected on one of the grounds mentioned above, instead of introducing (underlining is ours) the concept of reinstatement in cases of unfair termination of employment on the grounds mentioned. Similarly, there would have been no need to introduce the concept of reinstatement in cases of unfair termination of employment on the ground of redundancy since a worker would always (even in a case of reduction of workforce) have been able to report a dispute seeking reinstatement following the termination of his employment. Such an interpretation is clearly untenable.

In the present matter, the Disputant has submitted his resignation. However, his averment is that he has been constructively dismissed and that the termination of his contract of employment was effected as a result of duress. It is also argued that

Disputant has been deprived of his rights under sections 36, 37 and 38 of the Employment Rights Act. For the reasons given above, the Tribunal finds that it has no jurisdiction to enquire into the present dispute and to make an award thereon. The Disputant should have gone before the competent jurisdiction. The dispute is thus set aside.

(Sd) Indiren Sivaramen
Vice-President

(Sd) Raffick Hossenbaccus
Member

(Sd) Desire Yves Albert Luckey
Member

(Sd) Renganaden Veeramootoo
Member **18 October 2013**