

**EMPLOYMENT RELATIONS TRIBUNAL**

**AWARD**

**RN 40/13**

**Before**

<b>Indiren Sivaramen</b>	<b>Vice-President</b>
<b>Soonarain Ramana</b>	<b>Member</b>
<b>Rajesvari Narasingam Ramdoo</b>	<b>Member</b>
<b>Georges Karl Louis</b>	<b>Member</b>

**In the matter of:-**

**Mr Sheryad Hosany (Disputant)**

**And**

**Cargo Handling Corporation Ltd (Respondent)**

The present matter has been jointly referred to the Tribunal by both parties for voluntary arbitration under Section 63 of the Employment Relations Act (hereinafter referred to as "the Act"). The parties have not been able to come to an agreement and the Tribunal thus proceeded to hear the matter. Both parties were assisted by Counsel. The terms of reference read as follows:

*"Whether, Mr Sheryad Hosany, should be reinstated in his employment at the Cargo Handling Corporation Ltd or otherwise re-employed."*

It is apposite to note that though the letter of referral signed on behalf of both parties is dated 13 May 2013, the joint referral was lodged at the Tribunal only on 7 June 2013. Parties should see to it that any joint referral for voluntary arbitration of a dispute is made as diligently as possible bearing in mind the short time limit imposed on the Tribunal to dispose of such matters.

The Disputant deponed before the Tribunal and he solemnly affirmed to the truthfulness of the contents of his Statement of Case. He stated that he was re-employed/reinstated on 1 December 2011 and his contract terminated on 2 December 2011. He did not agree that his contract of employment was first terminated in August 2008 but stated that he worked up to 2009 without any problem. He produced some of his payslips for the period August 2008 to October 2009 (Docs A to A10). In October 2009, he averred that his contract was terminated without any disciplinary committee. He averred that he was re-employed/reinstated

on 1 December 2011 and completed his shift on that day but his contract was then terminated on the next day.

In cross-examination, he did not agree that he was absent from work on numerous occasions between 2007 and 2008. He stated that he was only absent for eight consecutive days before October 2009 and a medical certificate was delivered at his place of work. He agreed that he requested the company to take him back as he had family problems and could not come to work. Disputant was shown a document purporting to be a contract which he signed but Disputant averred that he did not sign the said document. He averred that he was paid 60% of his salary for December 2011. He did not agree that the issue of reinstatement did not arise.

Mr Balgobin, a Deputy Permanent Secretary from the Prime Minister's Office then deponed before the Tribunal. He stated that his Ministry was under the impression, following the correspondence received from Respondent, that Management was seeking advice from them. Based on information supplied by Respondent, they informed the Respondent that the Ministry could not condone that an officer be reinstated a second time. He stated that the Prime Minister's Office does not interfere in the day-to-day management of organisations like Respondent but that advice is sometimes sought in complex matters and that they do try to sort out matters and share their experience or information gathered from other Ministries. He confirmed that the termination of Disputant's contract of employment is a matter for the Respondent to consider and not for the Prime Minister's Office.

Mr Dahari, the representative of Respondent then deponed and he solemnly affirmed to the truthfulness of the contents of Respondent's Statement of Case. Mr Dahari averred that Disputant last attended work on 18 August 2008 but through an administrative error on the part of Respondent, the latter would have been paid even though he was not working at the Respondent. He alleged that the officer in charge of recording attendance of workers at each of the two terminals operated by Respondent wrongly assumed that the Disputant was working at the other terminal. This would, according to him, explain why there was no mention on the relevant pay slips of items like travelling, overtime and so on. He added that there was a meeting with the Director of the Ministry of Labour and a request for the reinstatement of Disputant on humanitarian grounds was made. Management decided to give Disputant a new contract of employment for one year as warehouseman on 1 December 2011 but later on the then acting Managing Director drew his attention to the letter from the Prime Minister's Office to the effect that Disputant could not be reinstated. The contract of Disputant was terminated on 2 December 2011 with the payment of Rs 8200- in lieu of one month's notice. He stated that the decision was taken by the Managing Director of Respondent and that Disputant was not on the permanent establishment of Respondent.

In cross-examination, Mr Dahari averred that Disputant had committed a breach of contract in August 2008 and his contract was then terminated. There was no disciplinary committee or letter of termination of employment issued. He agreed that on 1 December 2011 the Respondent 'had decided to turn a page and write a new chapter in the relationship' between Disputant and Respondent.

Counsel for Respondent has in her submissions stressed on the terms of reference as couched and submitted that the matter would fall within the jurisdiction of the Industrial Court. She added that the Tribunal is being asked to consider the fairness of the dismissal, the procedure adopted and the reasons given by the employer to justify the dismissal. This would, according to her, fall within the jurisdiction of the Industrial Court. Counsel for Disputant submitted that since this was a joint referral for voluntary arbitration, the Respondent could not come and say that the Tribunal cannot proceed with the case. He argued that there was a sound and valid decision taken on 1 December 2011 to reinstate Disputant in his employment and that an answer has to be found as to what new element has arisen up to 2 December 2011 to justify Disputant being shown the exit door.

The Tribunal has examined carefully the submissions made by both Counsel. "Labour dispute" is defined at section 2 of the Act as follows:

*"(a) means a dispute between a worker, or a recognised trade union of workers, or a joint negotiating panel, and an employer which relates wholly or mainly to wages, terms and conditions of employment, promotion, allocation of work between workers and groups of workers, reinstatement or suspension of employment of a worker;*

*(b)...."*

The definition includes the term "reinstatement" but apart from this definition the Act as it stood prior to the amendments brought by the Employment Relations (Amendment) Act 2013 or even after these amendments does not contain any other reference to the term "reinstatement". The Employment Rights Act as amended by the Employment Rights (Amendment) Act 2013 on the contrary specifically provides that the Industrial Court may order the reinstatement of a worker in his former employment under section 46(5B) of the said Act. Under section 39B of the same Employment Rights Act, the Employment Relations Tribunal may order the reinstatement of a worker in his former employment in cases of reduction of workforce. 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. Section 39B (**above**) at its subsection (9) provides that the Tribunal may, with the consent of the worker, order that a worker be reinstated in his former employment where it finds that the reduction of workforce is unjustified. This Tribunal has been granted an added jurisdiction for the first time under the Employment Rights Act in relation to the reduction of workforce and the closing down of an enterprise (sections 39A and 39B of the said Act).

The Employment Relations Act as its name suggests relates to employment relations and save for “reinstatement” (to be dealt with further down) all the items specifically mentioned in the definition of “labour dispute” relate to situations whereby the contract of employment between the worker and the employer still exists and has not been severed. Section 3 of the Industrial Court Act provides that “*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 has replaced the Labour Act and is mentioned in the First Schedule to the Industrial Court Act. The Industrial Court thus shall have exclusive jurisdiction to try any matter arising out of the Employment Rights Act. This is subject to section 46(5A) of the Employment Rights Act which provides that where a matter has been referred to the Tribunal under section 39B (Reduction of workforce), the Industrial Court shall have no jurisdiction to hear the matter. Otherwise, all matters arising out of the termination of a contract of employment or contract of service fall under Part VIII (Termination of agreement) of the Employment Rights Act (except for a public officer or local government officer as per section 3(2)(a) of the Employment Rights Act). Section 71 of the Employment Relations Act further provides the following:

**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.*

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. The procedure applicable in cases of reduction of workforce is completely different and we are not here in the realm of a case of reduction of workforce.

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).

Since the Tribunal has no jurisdiction to order the reinstatement of Disputant in his former employment in this particular case, *a fortiori* it will have no jurisdiction to order the re-employment (if at all possible) of the worker. The worker had other alternatives available to him if he wanted to challenge the termination of his employment (it is admitted that his contract of employment was terminated on 2 December 2011). Even though the dispute has been jointly referred to us by both parties, the parties could, as per section 63 of the Act, only refer a labour dispute for arbitration. This is not a “labour dispute” as defined in the Act and the dispute is thus set aside.

**(Sd) IndirenSivaramen**  
**Vice-President**

**(Sd) Soonarain Ramana**  
**Member**

**(Sd) Rajesvari Narasingam Ramdoo**  
**Member**

**(Sd) Georges Karl Louis**  
**Member**

**29 August 2013**