

EMPLOYMENT RELATIONS TRIBUNAL

RULING

RN 90/13

Before

Indiren Sivaramen	Vice-President
Vijay Kumar Mohit	Member
Desire Yves Albert Luckey	Member
Georges Karl Louis	Member

In the matter of:-

Miss Marie Karen Ladouceur (Disputant)

And

**The State of Mauritius as represented by Ministry of Health &
Quality of Life (Respondent)**

In presence of

**Ministry of Civil Service & Administrative Reforms (Co-
Respondent)**

The terms of reference of the present dispute read as follows:

“In spite of me having the required qualifications (as specified in the existing scheme of service) for appointment as Clinical Psychologist, I am not being appointed, but instead steps are being taken to amend the scheme of service. My request is that I be appointed Clinical Psychologist with effect from date of vacancy.”

All the parties were assisted by Counsel and Counsel for Respondent and Co-Respondent has taken a preliminary point to the effect that the present case cannot proceed, given that

(a) This Tribunal has no jurisdiction as regards the prayer now sought; and

(b) All interested parties have not been put into cause.

Both Counsel offered arguments on the preliminary point raised and the Tribunal is required at this stage to deliver a second ruling in the present dispute following an earlier preliminary point which had been taken on behalf of Co-Respondent.

Counsel for Respondent and Co-Respondent argued that the Tribunal cannot proceed with the prayer now sought namely as to the eligibility of Disputant and in relation to the scheme of service which is still in issue. She qualified the dispute as being wholly premature since there was no promotion or appointment exercise pending. According to her, eligibility for appointment would not fall within the definition of labour dispute under the Employment Relations Act (hereinafter referred to as "the Act") and thus within the jurisdiction of the Tribunal. Counsel wondered whether the Disputant was seeking for a simple declaration that she satisfies the scheme of service or whether it was a declaration that may impact on the Public Service Commission to contribute wholly or significantly to an appointment. Counsel referred to the cases of **Bye Ramatoollah Nayeck v Public Service Commission & others 2013 SCJ 455** and **Harinath Ramoutar v Commissioner of Prisons & Anor [2012] UKPC 29**. On the issue of other parties, she argued that Disputant is looking directly at what would happen supposedly to other persons in the same position and cadre as the latter. Any declaration as to eligibility may directly and possibly adversely affect their interests. Counsel then referred to the case of **The Public Service Commission v the Public Bodies Appeal Tribunal 2011 SCJ 382**.

Counsel for Disputant argued in relation to the second issue that he has no problem if the Tribunal which has the powers to do so invites all parties who may have an interest in the matter to be part of the proceedings. As regards the first issue, he argued that no issue was raised with regard to the nature of the dispute before the Commission for Conciliation and Mediation or to the power of the said Commission to refer the dispute to the Tribunal. He referred to the doctrine of estoppel and suggested that since the Respondent (and Co-Respondent) had not taken the point at the very first opportunity, they were stopped from raising same at this stage. Counsel added that if the Tribunal finds that his friend is right, this would mean that public officers have no possibility whatsoever to come before the Tribunal to vindicate their rights. He intimated that this was not the intention of the legislator.

Counsel for Disputant further argued that what Disputant is claiming relates wholly or mainly to the terms and conditions of her employment. Terms and conditions would include terms and conditions upon which Disputant can be promoted. Counsel made it clear that Disputant was not praying this Tribunal to appoint her because all powers of appointment are vested in the Public Service Commission. Counsel argued that the Disputant is averring that she considers that an injustice has been done to her and that the injustice is that she has not been given the same opportunities to be appointed. Disputant also considers that the changes which are contemplated by Co-Respondent amount to a downgrading of qualifications which rightly or wrongly are intended to give a favourable advantage to her colleagues. He referred to terms and conditions under

which Disputant was appointed in a temporary capacity in 2009. Though latter was to be on probation for one year, nothing has happened until now for something for which the latter is not responsible but for which others are responsible. Counsel argued that what is being asked in the present case is a declaration which is not something that binds but which has a lot of persuasive value. Counsel criticized the term “the prayer now sought” as used in the preliminary point taken. He added that if there is an issue of jurisdiction, this should come at the end and that the Ministries will be helped along the process by the award to do what is right.

Counsel for Respondent and Co-Respondent clarified that ‘the prayer now sought’ was as per a statement made by learned Counsel at a previous sitting that what was sought was a declaration on eligibility and that the amended scheme of service was in issue.

The Tribunal has carefully considered the arguments of both Counsel. Counsel for Disputant has wisely shifted discussions before the Tribunal from the request made by Disputant for an appointment (as per the terms of reference) to the Disputant allegedly seeking a declaration on eligibility and to the issue of scheme of service. Counsel for Disputant conceded in clear terms that the Tribunal cannot award that Disputant should be appointed (be it now or as from the date of vacancy). Counsel for Disputant argued that “*She [meaning the Disputant] is not praying this Tribunal to appoint her because it is clear that all powers of appointment are vested in the Public Service Commission. The Public Service Commission is the constitutional body that looks after the appointment etc. and promotions of public officers. But this Disputant is saying, I have consented with the Commission to have this matter referred to you for arbitration. Why? Because I consider that an injustice has been done to me and that injustice is that I consider myself not to have been given the same opportunities to be appointed for these reasons and I consider that the changes which are being contemplated by the Co-Respondent amount to a downgrading of qualifications which rightly or wrongly are intended to give a favourable advantage on my other colleagues.*” The dispute as described here is different from the dispute as per the terms of reference and different from previous statements made by Counsel in relation to what was the dispute and which basically amounted to eligibility of Disputant for appointment. Even on this issue of “eligibility”, Counsel for Disputant realised his difficulty and was more “nuancé” this time by stating that “*She [meaning Disputant] is simply putting before the Tribunal matters, facts and information which would enable the Tribunal to say, look maybe this person has a legitimate claim to consider herself to be eligible for appointment but this is a matter for the PSC to decide, it is not for me because I don’t have the power to decide but I consider that in the light of what has happened there is something which is wrong.*”

The Tribunal wishes to highlight that it will not shy away from its responsibilities the more so that it deals with employment relations where every opportunity should be given to parties to try to find solutions so that good employment relations prevail. However, the Tribunal has been established by law and the Tribunal has to operate within its jurisdiction and confines of the law. Irrespective of the various statements made by Counsel as to what the case for the Disputant is or the prayer being sought is,

the case as referred to us by the Commission for Conciliation and Mediation is as per the terms of reference. For ease of reference, same is again reproduced below:

“In spite of me having the required qualifications (as specified in the existing scheme of service) for appointment as Clinical Psychologist, I am not being appointed, but instead steps are being taken to amend the scheme of service. My request is that I be appointed Clinical Psychologist with effect from date of vacancy.”

There is no mention of “eligibility” or that the amendment of the scheme of service is to give or giving an unfair advantage to her colleagues (who would then presumably have had to be joined as parties) or even that an amendment of the scheme of duties is to be prejudicial to her. The thrust of the terms of reference is that she is to be appointed Clinical Psychologist with effect from date of vacancy. As conceded by Counsel for Disputant, this is not within the province of the Tribunal. We may here refer to section 72(5) of the Employment Relations Act (hereinafter referred to as the Act) which reads as follows:

(5) An award under sections 56(5) and 70(1) shall not contain any provision inconsistent with any enactment, other than a Remuneration Regulations, relating to the terms or conditions of, or affecting, employment, and any such provision shall, to the extent of the inconsistency, be void.

Section 70(1) of the Act reads as follows:

(1) Where a labour dispute is referred to the Tribunal under section 63 or 69(7), the Tribunal shall enquire into the dispute and make an award thereon within 90 days of the referral.

The present dispute has been referred to the Tribunal by the Commission for Conciliation and Mediation under section 69(7) of the Act.

Now section 89(1) of the Constitution provides as follows:

89. Appointment of public officers

(1) Subject to this Constitution, power to appoint persons to hold or act in any offices in the public service (including power to confirm appointments), to exercise disciplinary control over persons holding or acting such offices and to remove such persons from office shall vest in the Public Service Commission.

A decision of the Public Service Commission under section 89 of the Constitution is amenable to judicial review only before the Supreme Court or subject to an appeal before the Public Bodies Appeal Tribunal set up under section 91A of the Constitution.

By virtue of section 72(5) of the Act, the Tribunal cannot make an award as per the terms of reference or even along the lines implied by the statement of case of Disputant whereby at paragraph 10, Disputant avers for instance that she considers herself to be

fully qualified and eligible to be appointed as Clinical Psychologist substantively as from 30 October 2010. In fact, had proper terms of reference been drawn in relation to “eligibility” for instance, the next question would have been whether one is dealing with “threshold eligibility” (if at all applicable in the present case) or “suitability”. As explained in the Privy Council case of **Harinath Ramoutar (above)**, “suitability” is within the sole province of the Public Service Commission (though it may be decided under delegated powers of the Public Service Commission). The Tribunal may not proceed in an exercise with a view to determining the “suitability” of a person for appointment in a substantive capacity in the public service. However, “threshold eligibility”, on the other hand, is not in issue in the present matter given that Disputant has already been appointed as Temporary Clinical Psychologist according to one and the same (underlining is ours) scheme of service which is in force.

In line with the reasoning in the Privy Council case of **Harinath Ramoutar (above)**, the only issue in the present matter is one of “suitability” of Disputant for appointment in a substantive capacity. This is a matter within the sole premise of the Public Service Commission and the latter cannot be told what to do.

The plea of estoppel raised on behalf of Disputant cannot succeed inasmuch as the issues raised relate to the jurisdiction of the Tribunal and the constitutional powers of appointment of the Public Service Commission.

For all the reasons given above, the Tribunal thus finds that it has no jurisdiction and cannot hear the dispute as laid down in the terms of reference or in the prayer as now framed by Counsel (if at all possible given the clear terms of reference), that is, in terms of ‘eligibility’ of Disputant for appointment. However, bearing in mind the spirit of the Act and the emphasis all along on maintaining good employment relations and ex facie the pleadings before us, the Tribunal trusts that the Respondent, whose failure to arrange relevant theoretical training in Applied Clinical Psychology (as admitted by Respondent at paragraph 6(b) of Respondent’s statement of reply) has contributed to this unsatisfactory situation, will take appropriate steps so that Disputant may “*relinquish his [her] frustration, feel safe and relaxed in his [her] employment*” (**Mr S.P Mootosamy and Bank of Baroda i.p.o Bank of Baroda Employees Association, RN 155 (GN 596 of 1984)**). The Tribunal is confident that Respondent will no more rely on averments such as the one at paragraph 9(b) of Respondent’s statement of reply and that all interested parties will assume their responsibilities and act diligently so that the present dispute may be “*regarded as a ‘mauvais souvenir’ best forgotten so that relations may resume their desired smoothness.*” (**vide Mrs D.C.Y.P and The Sun Casinos Ltd, RN 202 (GN 1390 of 1988)**).

The Tribunal observes that it is in no way ruling that public officers have no right to vindicate their rights before the Tribunal as Counsel for Disputant wrongly assumed. The Tribunal will continue to hear disputes involving public officers referred to it provided of course that these fall within its jurisdiction and that the Tribunal is not precluded by law from making an award thereon.

The dispute is otherwise set aside.

(Sd) Indiren Sivaramen
Vice-President

(Sd) Vijay Kumar Mohit
Member

(Sd) Desire Yves Albert Luckey
Member

(Sd) Georges Karl Louis
Member

7 March 2014