EMPLOYMENT RELATIONS TRIBUNAL

RULING

RN 24/14 to RN 47/14

Before:	**Indiren Sivaramen**	**-**	**Vice-President**
	Vijay Kumar Mohit	**-**	**Member**
	Desire Yves Albert Luckey	**-**	**Member**
	Khalad Oochotoya	**-**	**Member**

In the matter of:-

CONSOLIDATED CASES

ERT/RN 24/14 – Mr Hassen Soodhoo
And
Sugar Insurance Fund Board

ERT/RN 25/14 – Mr Vishnuduth Jooron
And
Sugar Insurance Fund Board

ERT/RN 26/14 – Mr Dhaneshwar Bumma
And
Sugar Insurance Fund Board

ERT/RN 27/14 – Mr Tayeb Mohammed Kader Bathia
And
Sugar Insurance Fund Board

ERT/RN 28/14 **Mrs Aniffa Aumeerally**
And
Sugar Insurance Fund Board

ERT/RN 29/14 **Mr Mohamedally Rosun**
And
Sugar Insurance Fund Board

ERT/RN 30/14 - **Mrs Sabita Pattoo**
And
Sugar Insurance Fund Board

ERT/RN 31/14 **Mr Shaheed Dargaye**
And
Sugar Insurance Fund Board

ERT/RN 32/14 - **Mr Jacques Laval Fritz Chowrimootoo**
And
Sugar Insurance Fund Board

ERT/RN 33/14 – **Mr Suresh Mahadeo Jatoonah**
And
Sugar Insurance Fund Board

ERT/RN 34/14 - **Mr Mahmad Rafick Nannoo**
And
Sugar Insurance Fund Board

ERT/RN 35/14 - **Mr Pardoomandass Seebaluck**
And
Sugar Insurance Fund Board

ERT/RN 36/14 - **Mr Anandpersad Beeharry**
And
Sugar Insurance Fund Board

ERT/RN 37/14 - Mr Subash Lall Bamma
And
Sugar Insurance Fund Board

ERT/RN 38/14 - Mr Ootamduth Ramkeesoon
And
Sugar Insurance Fund Board

ERT/RN 39/14 - Mr S. Annoopam S. Buljeeon
And
Sugar Insurance Fund Board

ERT/RN 40/14 - Mr Goraj Peryagh
And
Sugar Insurance Fund Board

ERT/RN 41/14 - Mrs Rajwantee Rambojun
And
Sugar Insurance Fund Board

ERT/RN 42/14 - Mr Ramchundar Seekunto
And
Sugar Insurance Fund Board

ERT/RN 43/14 - Mr Koomar Bunjhun
And
Sugar Insurance Fund Board

ERT/RN 44/14 - Mr Dewjit Ramsahye
And
Sugar Insurance Fund Board

ERT/RN 45/14 - Mr Bohwaneswar Chitamun
And
Sugar Insurance Fund Board

ERT/RN 46/14 - Mr Dev Anand Rajoo
And
Sugar Insurance Fund Board

ERT/RN 47/14 - Mr Surendranath Gopal
And
Sugar Insurance Fund Board

The above twenty-four cases have been individually referred to the Tribunal for arbitration in terms of Section 69(7) of the Employment Relations Act 2008 (the "Act"). The twenty-four disputants and the Sugar Insurance Fund Board (the "Respondent") were assisted by counsel and both counsel have moved that the cases be consolidated since they relate to the same issue and are connected. The cases have been consolidated and the terms of reference are the same in all the cases and read as follows:

"Whether based on the BCA Consulting Report on the Review of the Organisation Structure and Human Resource Requirements at the Sugar Insurance Fund Board May 2013, I should have been granted the Voluntary Retirements Scheme in harmony with that of the MCIA, but this has not been the case. REF 4.1.3 and 4.2.2."

Learned counsel for the Respondent has taken a preliminary point in limine litis which reads as follows:

"The Sugar Insurance Fund Board (hereinafter referred to as the "SIFB") avers that the above Tribunal has no power and/or jurisdiction to entertain the present matter. One of the reasons in support of such a proposition is that there is no labour dispute under the law. The other obvious reason is that there exists between the Disputant and the Respondent a contractual obligation governed by the Civil Code which it is not possible to vary except by first cancelling the existing contract: an exercise for which the Tribunal has no jurisdiction.

The SIFB therefore prays that the present case be set aside."

The Tribunal proceeded to hear arguments from both counsel on the preliminary point in limine litis. A copy of an option form (similar forms were, according to learned counsel for Respondent, signed by all the disputants) signed by one of the disputants was produced and marked Doc A. Counsel for Respondent informed the Tribunal that he was in fact taking two points in limine litis and that the first one was that the Tribunal has no jurisdiction to go into whether there was some form of 'dol' since this would be a civil matter which goes completely outside the labour relations existing between an employer and an employee. It will not correspond to the definition of a labour dispute. He added that the contract by virtue of Article 1134 of the Civil Code will be the law of the parties. Until and unless the competent court says that the contract is tainted with 'dol', one cannot go behind the document. Under the second point in limine litis, learned counsel

argued that there is no ‘dispute’ as per section 2 of the Employment Relations Act (the “Act”) since the option concerns retirement and the workers will stop working and have already cashed the sum offered.

Counsel for the disputants argued that worker includes a former worker under the Act. He referred to the definition of ‘labour dispute’ and suggested that it has a broad ambit and would include any element in connection with the employment which flows from the relationship between employer and employee. A labour dispute would include a dispute in relation to pensions, lump sums or any sums payable by virtue of the employment of the worker. As far as the point raised in relation to Article 1134 of the Civil Code is concerned, he argued that in the realm of industrial relations, an employment contract or any contract flowing from that relationship has a special character. Contracts arising out of that relationship would be considered, according to him, as “contrats d’adhésion” and thus escape the rigidity of Article 1134 of the Civil Code. Counsel added that these were disputes of interests and not disputes of rights.

The Tribunal has examined the arguments of both counsel. The two points in limine litis (or more appropriately the two limbs of the preliminary point) taken by learned counsel for Respondent are related and the Tribunal proposes to deal with both at the same time. Counsel for Respondent has referred to the fact that the contract, which is the option form, concerns retirement which has nothing to do with matters referred to in the definition of “labour dispute” and which come up during the “lifetime of a contract existing between an employer and an employee”. “Labour dispute” is defined in section 2 of the Act as follows:

“labour dispute” –
1(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) does not, notwithstanding any other enactment, include a dispute by a worker made as a result of the exercise by him of an option to be governed by the recommendations made in a report of the Pay Research Bureau or a salary commission, by whatever name called, in relation to remuneration or allowances of any kind;
(c) does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute

The dispute is no doubt between an employer and a worker since “worker” is in any event defined in the Act as including a former worker. “Wages” is defined in the Act as meaning “*all the emoluments payable to a worker under a contract of employment*”. The term “emoluments” is not defined in the Act. In the case of **Tyack L. Gerard v Air Mauritius Ltd & others 2010 SCJ 257**, the Supreme Court dealt with the issue of pensions and stated the following:

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. And those who administer a Pensions Scheme become a trustee of the accruals:
In the words of Lord Millet who delivered Judgment of the Law Lords of the Judicial Committee:
"As has been repeatedly observed, their rights are derived from their contracts of employment as well as from the trust instrument. Their pensions are earned by their services under their contracts of employment as well as by their contributions": ***Air Jamaica Ltd v. Charlton (P.C.), 1 WLR 1399*** *and* ***M. J. C. L. Robert Lesage v. Mauritius Commercial Bank and Anor [2004 MR 63]*** *and the cases cited therein* ***[Barber v Guardian Royal Exchange Society [1990] ICR 616; Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589; Mihlenstedt v Barclays Bank International Limited [1989] IRLR 522; Scally v Southern Health and Social Services Board [1992] AC 294; Johnson v Unisys 2001 [UKHL] 13; University of Nottingham v Eyett [1999] ICR 721; BG Plc v O'Brien [2002 IRLR 444.]***

For the purposes of tax law and by virtue of section 2 of the Income Tax Act, "emolument" includes pensions. Thus in the case of **Chettiar V.V & others v MRA 2013 SCJ 364,** the Supreme Court stated the following:

[16] *The above is clear as clear could be that the legislator has defined emoluments. And in the legislator's definition, emolument includes pensions. In fact it includes pension by a wide variety of names: super-annuation, retiring allowance, annuity or other reward in respect of or in relation to past employment etc.*

However, we are in the realm of employment relations and reference to tax provisions may not be suitable the more so when there are more appropriate indicators in related legislation such as the Employment Rights Act. Indeed, remuneration (which includes all emoluments) is specifically dealt with under Part V of the Employment Rights Act whereas items such as gratuity on retirement, grants, recycling fees and severance allowances are dealt with separately under Part X of the said Act under the heading "Compensation". The Tribunal will also refer extensively to a judgment of the Supreme Court in the case of **M.Boojhawon v C. Askurn 2008 SCJ 172,** where Her Ladyship J. Peeroo stated the following:

Since what is prevented by section 38 of the Courts (Civil Procedure) Act is an attachment or saisie arrêt in respect of any sum of money that is due by way of salary, it has to be decided whether the cash compensation paid under the Act can be assimilated into that.
The ordinary meaning of "by way of salary" has to be read into that section.
According to the New Oxford Dictionary of English, the phrase "by way of" means either constituting, as a form of or by means of. "Salary" means "a fixed regular payment,

typically paid on a monthly basis but often expressed as an annual sum, made by an employer to an employee, especially a professional or white-collar worker".
The notion of salary has no doubt evolved over the years. It no longer simply connotes the payment made by the employer in return for the work supplied by the employee, which normally forms the basis of a contract of employment for a valuable consideration - contrat à titre onéreux.
In ***Jurisclasseur Travail, vol. 3, Vo Salaire et accessoires****,* ***Fasc 25-10****,* ***Notion de salaire*** *the following extract is relevant to gauge the original meaning of wages:*
« 9. … Il constitue la prestation fournie par l'employeur en ***contrepartie du travail*** *accompli à son profit. Ainsi, tout contrat de travail implique un salaire et il n'existe pas de salaire hors du contrat de travail. La jurisprudence a souvent eu l'occasion de l'affirmer… Plus précisément, le versement du salaire constitue pour l'employeur l'obligation essentielle issue du contrat ; à la prestation fournie par le travailleur correspond le salaire versé : les deux obligations sont réciproques et interdépendantes, l'une ne se conçoit pas sans l'autre. »*

Under section 2 of the Labour Act the definition of "salary" and "wages" are not given but it is therein provided that "remuneration" -
(a) means all emoluments earned by a worker under an agreement;
(b) includes -
(i) any sum paid by an employer to a worker to cover expenses incurred in relation to the special nature of his work; and
(ii) any money to be paid to a job-contractor, for work, by the person employing the job-contractor;
(c) does not include money due as a share of profits;"

Now, the meaning of "emolument" or "emoluments" in the New Oxford Dictionary of English is "a salary, fee, or profit from employment or office". In contrast to "salary" defined earlier, "wage or wages" means "a fixed regular payment, typically paid on a daily or weekly basis, made by an employer to an employee, especially to a manual or unskilled worker".
A worker's wages, salary or emoluments are obviously the pay made by the employer to his employee under a contract of employment. Emoluments or remuneration may include the wages or salary for the work performed by the worker in the enterprise as well as all the privileges given by the employer not as a counterpart of the work supplied but to satisfy the needs of the worker. In certain cases, and especially in France, the notion of salary is given a much wider concept so as to include a social element. Nevertheless, the fact remains that the notion of wages or salary, and in any case, that of the basic salary, is not conceivable without there being work supplied in return – vide ***Jurisclasseur Travail, vol. 3, Vo Salaire et accessories****, (supra) in* ***note 12*** *the relevant part of which reads as follows:*
«….Mais cette extension du salaire ne doit pas pour autant masquer le fait que si la corrélation travail-salaire ne suffit pas, à elle seule, à caractériser le salaire, elle reste néanmoins le principe en dehors duquel on ne peut déterminer le salaire, le salaire de base tout au moins. »

In my view, it is clear that salary cannot be dissociated from and has to have as its counterpart work supplied by the worker. There is also nothing to suggest that the word "salary" must be construed differently in the context of section 38 of the Courts (Civil Procedure) Act.

This decision was upheld on appeal in **C.Askurn v M.Boojhawon 2010 SCJ 2**. Though that case dealt specifically with a provision of the Courts (Civil Procedure) Act, the Tribunal finds that in the context of the present Act, "wages" has also to have as its counterpart work supplied by the worker. The Tribunal finds that the benefits/lump sums paid in all the twenty-four cases (as agreed by counsel for disputants) and the quanta of which are now being challenged do not constitute "wages" as used in the definition of "labour dispute" in the Act.

Now, are the terms and conditions of the Voluntary Retirement Scheme (VRS), terms and conditions of employment of the disputants? For the disputes to be within the jurisdiction of the Tribunal, the disputes have to relate wholly or mainly to terms and conditions of employment (as per section 2 of the Act). A VRS provides an alternative way by which a worker (who is eligible thereto) may retire from his work. Until a worker has opted for a proposed VRS, the VRS forms part of the terms and conditions of employment of that worker. It is for the worker to decide whether to make use of the VRS or not. In the present matter, the VRS along with other terms and conditions of employment emanate from the BCA Consulting Report. Thus, a dispute in relation to the VRS itself is within the jurisdiction of the Tribunal.

However, since each disputant has signed an option form (ex facie the statements of case and in line with Doc A) and has benefitted from the VRS and been paid accordingly, can they be allowed to challenge the terms of the VRS before this Tribunal? The answer is no. Counsel for disputants rightly made reference to "disputes of rights" and "disputes of interests" but erred in arguing that the workers were raising "disputes of interests". In a **Handbook on Alternative Labour Dispute Resolution** by **F.Steadman** (under the aegis of the **International Training Centre of the International Labour Organisation**), 'interests dispute' is defined as one '*which arises from differences over the determination of future rights and obligations, and is usually the result of a failure of collective bargaining. It does not have its origins in an existing right, but in the interest of one of the parties to create such a right through its embodiment in a collective agreement, and the opposition of the other party to doing so*.' In this particular case, the disputants have signed option forms accepting the conditions of the VRS. The terms of the option form (as per Doc A) are quite telling:

"I, …… do confirm that I have taken cognizance of the offer made to me by the Board for voluntary retirement under the Voluntary Retirement Scheme (VRS) devised in the context of the review of the human resources requirements at the SIFB.

I hereby certify that I am opting for voluntary retirement under the above mentioned VRS on the terms and conditions set out in the report, which I have taken cognizance of (extract of offer enclosed).

I understand that this option is irrevocable. I also understand that if I decline the offer, I shall continue to receive the salary I am presently drawing and shall be governed by provisions of existing Retirement Benefits scheme."

They could not accept something in the morning to challenge it in the afternoon. The Tribunal will here refer to the ruling delivered in the case of **T.S.M Cunden & others And Technical School Management Trust Fund, RN 1028** where the Tribunal stated the following:

"*We fully endorse Counsel for the Respondent's stand that having entered into an agreement in the morning, only to disagree over it in the afternoon is simply unacceptable and the Tribunal is not to condone such flouting attitude. A contract is a binding document and we are not here to enter into conspiracy to any breach of signed agreement. Certainly, the matter would have been different if the disputed issues are in fact issues that are foreign and/or independent of what had been agreed. But here, those employees had already reached an agreement on the salary and grading issues. We have gone through all the authorities cited to us by Counsel and we find nothing to add except that it is trite law that one cannot go "contre et outre" le contenu de l'acte".*

In the case of **T.S.M Cunden & others (above),** the Tribunal referred to the judgment of the Supreme Court in the case of **Federation of Civil Service and Other Unions and others v. The State of Mauritius and The Attorney-General 2009 SCJ 214** and previous rulings/awards of the Tribunal in **Telecommunications Workers Union and Mauritius Telecom, RN 754** and **University of Mauritius Academic Staff Association and University of Mauritius, RN 980**.

At the same time, this stand would be along the lines of part (b) of the definition of "labour dispute" in section 2 of the Act. For ease of reference, part (b) of the definition, as amended by Act No. 5 of 2013, is reproduced below:

"(b) does not, notwithstanding any other enactment, include a dispute by a worker made as a result of the exercise by him of an option to be governed by the recommendations made in a report of the Pay Research Bureau or a salary commission, by whatever name called, in relation to remuneration or allowances of any kind"

Terms and conditions of employment may be challenged before the Tribunal but in this particular case by opting for the VRS, and cashing the benefits of the VRS, the workers have brought an end to their contracts of employment. The terms of the VRS are no longer terms and conditions of employment which they can benefit in the future but

already terms and conditions of the termination of their contracts of employment. The present matter is thus in relation to the terms and conditions of the termination of their contracts of employment (more specially the lump sum paid or VRS sum as the disputants have put it) or more simply in relation to the termination of their contracts of employment. Termination of contracts of employment is specifically provided for under Part VIII of the Employment Rights Act and apart from the Employment Promotion and Protection Division set up under Section 39A of the Employment Rights Act, there is nothing to suggest that the Tribunal has jurisdiction in relation to termination of contracts of employment (**vide Mr Sheryad Hosany and Cargo Handling Corporation Ltd, RN 40/13)**. In the said case of **Mr Sheryad Hosany (above)**, the Tribunal stated the following:

"*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."*

The terms of a VRS may, in an appropriate case, be challenged before the Tribunal (as sought to be done here) but this will be achieved by way of a proper "dispute of interests". The manner in which each and every of the 24 workers is trying to challenge the terms of the VRS by invoking pressure/coercion prior to the signing of the option forms is not the proper way to proceed before the Tribunal and is outside the jurisdiction of the Tribunal. We may here refer to an Indian case with the caveat that it is for guidance only. In the case of **A.K. Bindal & Anor vs Union of India & Ors, 2003 (98) FLR 1 (SC)**, the Supreme Court of India stated the following:

"*This shows that a considerable amount is to be paid to an employee ex-gratia besides the terminal benefits in case he opts for voluntary retirement under the Scheme and his option is accepted. The amount is paid not for doing any work or rendering any service. It is paid in lieu of the employee himself leaving the services of the company or the industrial establishment and forgoing all his claims or rights in the same. It is a package deal of give and take. That is why in business world it is known as 'Golden Handshake'. The main purpose of paying this amount is to bring about a complete cessation of the jural relationship between the employer and the employee. After the amount is paid and the employee ceases to be under the employment of the company or the undertaking, he leaves with all his rights and there is no question of his again agitating for any kind of his past rights, with his erstwhile employer including making any claim with regard to enhancement of pay scale for an earlier period. If the employee is still permitted to raise a grievance regarding enhancement of pay scale from a retrospective date, even after he has opted for Voluntary Retirement Scheme and has accepted the amount paid to him, the whole purpose of introducing the Scheme would be totally frustrated."*

Since the Tribunal has no jurisdiction in the present dispute, the Tribunal will certainly not venture to consider whether, if at all, the option form in the present matter bore the

characteristics of a ‘contrat d’adhésion.’ The Tribunal will also abstain from commenting on the nature of the VRS in the present case.

For all the reasons given above, the Tribunal finds that though it may have jurisdiction to hear a case which relates to a VRS (in an appropriate case), it does not have jurisdiction in the present matter inasmuch as the disputes ex facie the terms of reference, pleadings and documents on record do not constitute labour disputes as defined. Also, the Tribunal has no jurisdiction to cancel or vary the agreements entered into for the purposes of the VRS and whereby the contracts of employment of the disputants have come to an end. The disputes are thus purely and simply set aside.

(Sd)Indiren Sivaramen

Vice-President

(Sd)Vijay Kumar Mohit

Member

(Sd)Desire Yves Albert Luckey

Member

(Sd)Khalad Oochotoya

Member

11 July 2014