

EMPLOYMENT RELATIONS TRIBUNAL

RULING

RN 104/13

Before

Indiren Sivaramen Vice-President

Ramprakash Ramkissen Member

Denis Labat Member

Triboohun Raj Gunnoo Member

In the matter of:-

Mr Lindsay Wilson (Disputant)

And

Municipal Council of Quatre Bornes (Respondent)

In presence of:

- 1. Local Government Service Commission (Co-Respondent No. 1)**
- 2. Pay Research Bureau (Co-Respondent No. 2)**

The present dispute has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(7) of the Employment Relations Act (hereinafter referred to as "the Act"). Co-Respondents Nos. 1 and 2 have been joined as parties during the course of the proceedings. There was no possibility of a settlement and Counsel for Co-Respondent No. 1 raised two preliminary points which read as follows:

- (1) The case does not fall within the definition of a labour dispute as defined under the Employment Relations Act; and
- (2) the Tribunal does not have jurisdiction to grant the prayer sought by the Disputant.

The matter was thus fixed for arguments and all parties were assisted by Counsel before the Tribunal. The terms of reference of the dispute read as follows:

“Whether I, Lindsay Wilson, should be reverted back to my previous post of Attendant (Vocational Training Centre) and be granted one increment every two years on completing 24 years of service in a single grade as per PRB Report 2008.”

The Tribunal heard arguments from all parties on the preliminary points raised. A certified copy of the option form signed by Disputant accepting the revised emoluments and terms and conditions of service following the Pay Research Bureau (PRB) Report 2008 was produced (Doc A) as well as extracts from the said PRB Report 2008 (Doc B). Counsel for Co-Respondent No. 1 argued that the Disputant is in effect seeking to challenge his appointment as Handy Worker and that such a matter does not fall within the definition of labour dispute. She also added that the definition of labour dispute specifically excludes a dispute, made by a worker as a result of the exercise by him of an option to be governed by a recommendation of the PRB, in relation to remuneration or allowances. She submitted that the issue of appointment cannot be challenged before this forum and that the appropriate venue would be the Public Bodies Appeal Tribunal or by way of judicial review before the Supreme Court. She also referred to paragraph 6 of Disputant’s Statement of Case and to the terms of reference of the dispute. She then relied on the Supreme Court judgment in the case of **Federation of Civil Service and other unions & others v State of Mauritius & Anor. 2009 SCJ 214.**

Under the second limb, Counsel argued that the quashing of the decision of the Respondent does not even arise since the decision to appoint is that of Co-Respondent No. 1 and not Respondent. She suggested that the prayer sought would imply quashing the appointment which has been made and reappointing the Disputant to his previous post. Issues of eligibility to appoint is exclusively within the jurisdiction of the appointing body, that is, Co-Respondent No. 1. She relied on the ruling delivered in the case of **Miss Marie Karen Ladouceur v The State of Mauritius as represented by the Ministry of Health & Quality of Life RN 90/13.**

Counsel for Disputant argued that the Disputant is not challenging the decision of the PRB. He suggested that the dispute is the appointment which is being challenged since the appointment of Disputant to the new post has changed Disputant's terms and conditions of employment. With regard to the second point raised, Counsel argued that if the Tribunal finds that the decision should not be quashed or that Disputant should not be reverted back to his former post, then the Disputant shall be praying that the Tribunal otherwise deals with the dispute as it may deem fit and proper.

Counsel for Co-Respondent No. 2 argued that Disputant was in any case bound by its terms of reference.

The Tribunal has examined the arguments of Counsel. As opposed to the Public Service Commission, the Local Government Service Commission is not established by the Constitution but emanates from the **Local Government Service Commission Act** (hereinafter referred to as the "**LGSCA**"). **Section 4** of the **LGSCA** provides as follows:

4. Powers of the Commission

(1) Subject to the other provisions of this section and to the Local Government Act 1989, the power -

(a) of appointment;

(b) to exercise disciplinary control over local government officers;

(c) to remove from office or approve the retirement of local government officers;

(d) to select candidates from among local government officers for the award of scholarships or other similar privileges, shall vest exclusively in the Commission.

(2) Subject to subsection (3), the Commission shall not, in the exercise of its functions, be subject to the direction or control of any other person or authority.

(3) Nothing in this Act shall preclude the Supreme Court from exercising jurisdiction in relation to any question whether the Commission has performed its functions in accordance with any law in force or should not perform any function.

(4) The Commission may, subject to such conditions as may be prescribed, delegate any of its powers under subsection (1) to the Chief Executive of any Municipal City Council, Municipal Town Council or District Council.

It is apposite to note that **section 3** of the **Public Bodies Appeal Tribunal Act 2008** provides as follows:

3. Jurisdiction of Tribunal

(1) Subject to subsections (2) and (3), the Tribunal shall hear and determine an appeal made by any public officer, or any local government officer, against any decision of the Public Service Commission or the Local Government Service Commission, as the case may be, pertaining to an appointment exercise or to a disciplinary action taken against that officer.

(2) An appeal shall be made –

(a) within 21 days of the notification to the officer of the decision referred to in subsection (1), or within 21 days of such public notification of the decision as may have been made, whichever is the earlier; and

(b) in such form and manner as may be prescribed by the Tribunal.

(3) No appeal shall lie to the Public Bodies Appeal Tribunal where the appeal relates to an appointment made following a call for application for an office by public advertisement.

(4) An officer shall have the right to appeal under subsection (1), notwithstanding the Public Service Commission Regulations, the Local Government Service Commission Act and the Local Government Service Commission Regulations

Despite section **4(2)** of the **LGSCA**, section **3(4)** of the **Public Bodies Appeal Tribunal Act** specifically provides that an officer shall have the right to appeal to the Public Bodies Appeal Tribunal against any decision of Co-Respondent No. 1 pertaining to an appointment exercise as per **subsections 3(1) and 3(2)** of the **Public Bodies Appeal Tribunal Act**. “Appointment” was defined in **section 2** of the **LGSCA** (at the time of Disputant’s appointment as Handy Worker (Special Class) and prior to the amendment brought by **Act No. 36 of 2011**) as follows:

“appointment” means-

(a) the designation of a person not in the service of a local authority to an office of emolument in the service of a local authority, including a designation in a temporary or an acting capacity or subject to subsequent confirmation;

(b) the grant of permanent and pensionable terms of service in a pensionable office in the service of a local authority to a person recruited and serving on contract terms or in an unestablished capacity;

(c) the engagement or re-engagement of a person on contract terms in the service of a local authority;

(d) the transfer of a local government officer, on promotion or otherwise-

(i) from one office of emolument to another within the service of the same local authority; or

(ii) from one local authority to another.

In the present matter, ex facie the pleadings (including paragraph 5 of Disputant's Statement of Case) and documents annexed (including the appointment letter of 29 June 2010), it is clear and undisputed that Disputant was appointed as Handy Worker (Special Class). This also tallies with the then definition of "appointment" as per **section 2** of the **LGSCA** or even the current definition of "appointment" (under the same Act) which includes the promotion of a local government officer from one office of emolument to another within the service of the same local authority or from one local authority to another. Indeed, the Tribunal takes notice that as per the PRB Report 2008, the salary scale for Handy Worker (Special Class) (QBW 5) was slightly higher than that for Attendant (Vocational Training Centre) (QBWEL 4) (both under the heading Municipal Council of Quatre Bornes).

The main argument put forward by Counsel for Disputant to aver that the Tribunal has jurisdiction is that the dispute relates to the terms and conditions of employment of Disputant which have changed following the appointment. He however at the same time conceded that the appointment itself is being challenged. The Tribunal does not agree with his arguments since then almost every item including wages could be extended to form part of terms and conditions of employment. The law, and more particularly the **Employment Relations Act**, makes a difference between wages, terms and conditions of employment or even promotion. The present dispute concerns wholly or mainly the appointment made. The **Employment Relations Act** does not contain any clause which provide specifically for any derogation from **section 4(2)** of the **LGSCA** as opposed to **section 3(4)** of the **Public Bodies Appeal Tribunal Act**. Thus, even though the Tribunal generally has jurisdiction in a dispute relating, for example, to promotion, a specific piece of legislation such as **sections 4(1)** and **4(2)** of the **LGSCA** shall prevail over the general definition of "labour dispute" in the Act (applying the maxim "Generalia Specialibus Non Derogant"). The Tribunal cannot be required to sit on appeal against a decision of Co-Respondent No. 1 pertaining to an appointment. An award in relation to the appointment exercise may go against **section 4(2)** of the **LGSCA** and thus be void under **section 72(5)** of the **Employment Relations 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.

In the case of **N. Needhoo & Ors and Grand Port/Savanne District Council, in presence of 1. Local Government Service Commission 2. Ministry of Labour, RN 746**, the Tribunal stated the following:

“Section 4(1) of the Local Government Service Commission Act clearly and explicitly states that the said powers of the Local Government Service Commission “shall in relation to local government officers vest exclusively in the Commission” (the underlining is ours). The intention of the Legislator is expressed in no uncertain terms the exclusivity of the powers conferred upon the Local Government Service Commission, in other words restricted only to the Local Government Service Commission.

The terms of reference in the present case go clearly against the exclusive powers given by the Local Government Service Commission Act.”

The Tribunal does not have jurisdiction or power “to quash the decision” of Co-Respondent No. 1 (and not that of Respondent as wrongly prayed for in paragraph 7 of Disputant’s statement of case even though he averred at the same time at paragraph 5 that the decision was that of Co-Respondent No. 1) and “revert the Disputant back to his previous post of Attendant (Vocational Training Centre)” or to control or in any manner direct Co-Respondent No. 1 in relation to Disputant’s appointment. The present dispute is clearly misconceived.

The dispute is thus set aside.

(Sd) Indiren Sivaramen
Vice-President

(Sd) Ramprakash Ramkissen
Member

(Sd) Denis Labat
Member

(Sd) Triboohun Raj Gunnoo
Member

9 May 2014