**EMPLOYMENT RELATIONS TRIBUNAL**

**ERT/RN/39/2015**

**RULING**

**Before:**

**Shameer Janhangeer Vice-President**

**Vijay Kumar Mohit Member**

**Jay Komarduth Hurry Member**

**Georges Karl Louis Member**

**In the matter of: -**

**Mrs Soopamah Veerasamy**

*Disputant*

and

**Mauritius Educational Development Co Ltd (MEDCO)**

*Respondent*

**In presence of: -**

**1. Private Secondary School Authority (PSSA)**

**2. State Insurance Company of Mauritius Ltd (SICOM)**

*Co-Respondents*

The present matter has been referred to the Tribunal by the *Commission for Conciliation and Mediation* (the “*CCM*”) for arbitration in terms of *section 69 (7)* of the *Employment Relations Act* (the “*Act*”). The terms of reference of the matter reads as follows:

*Whether pursuant to the agreement reached between MEDCO and myself by way of letter dated 25.02.09 signed by the then Chairman of MEDCO, Mr R. Daureeawoo, I should be entitled to claim a full pension on the date of retirement, that is:*

1. *a lump sum of Rs 1,104,250.00 instead of Rs 977,264.00;*
2. *a monthly pension of Rs 18,399.00 instead of Rs 15,859.25.*

Both parties to the dispute were represented by Counsel. Prior to the hearing to the dispute, Counsel for the Respondent has raised a two-fold plea *in limine*, as follows:

1. *the application or the claim has been made outside the time limit so that the Tribunal is barred from adjudicating upon the matter; and*
2. *prayer 11 is in the nature of an order for specific performance and this matter can only be trashed out before a Court of Law.*

The representative of *SICOM* was called to adduce evidence for the purpose of the argument on the plea *in limine*. Mr Rajkamal Rughoo stated that he is fully conversant with the file of the Disputant, when she retired and when the payment of her benefits were. The payment for her lump sum was made on 24 August 2011. Referring to two letters dated 20 September 2011, the Disputant was informed by these two letters that payments were made on 24 August 2011 for the gratuity and 1st September 2011 for arrears of pension. He did not have any correspondence to show that prior to 20 September 2011, *SICOM* had informed her of what she is to be paid. He produced a copy of the two letters dated 20 September 2011 (Documents A & A₁). He also stated that in practice everybody knows what is being paid to them as when they sign the retirement form, they exercise an option on whether they want a lump sum and a reduced pension. The Disputant signed hers on 24 June 2011. As a general rule, *SICOM* does not give a breakdown of what is being paid but does so at request or when one calls at the office to fill in a form. He produced a copy of the retirement form together with a covering letter from the PSSA dated 11 July 2011 (Documents B & B₁). In relation to the second point of the plea *in limine* raised, Mr Rughoo also explained what the rules of the *PSSA Pension Scheme* stated in relation to the pensions and produced a copy of same (Document C). He also added that nobody can exercise an option without knowing what is to be paid and that he was not initially aware if Mrs S. Veerasamy reported a dispute on 29 February 2012 to the *CCM*.

The Disputant in the present matter, Mrs Soopamy Veerasamy, was also called to adduce evidence regarding the arguments on the plea *in limine*. She was made aware of the lump sum paid to her through the letter dated 20 September 2011. She was not given a breakdown of how the amount was reached and requested same after receiving the letter dated 20 September 2011 around September last year as she was not in the country for 2 or 3 years. Following her request for the breakdown, she had a mediation with *MEDCO* and *SICOM* and lodged a case at the *CCM* thereafter.

Upon questions by Counsel for the Respondent, she stated that she went to England shortly after her retirement in July 2011 and received the letter when she returned to Mauritius. She was not aware of the amount paid before she returned. She proceeded to England in 2011, 2012, 2013 and 2014. She reported a dispute to the *CCM* on 29 October 2012 regarding vacation leave and produced a letter from the *CCM* on the dispute (Document D). She did not know whether she was receiving her full pension or not despite knowing of the amount. She stated that she did not care about it to be frank. She confirmed having reported the present dispute on 28 October 2014. She did not include the present dispute to the one she reported in 2012 as she did not realise that she was not paid.

She further stated that the present case was reported on two issues before the *CCM*, the first on the current issue and the second on the issue of whether she should have been afforded pre-retirement leave. As for her dispute regarding vacation leave, same was set aside as she was in England and she has reported the matter anew to the *CCM*. A letter dated 13 April 2015 in relation to the present dispute was also produced (Document E). She also stated that upon her retirement she was not given a letter stating what her benefits would be or a letter of retirement.

Counsel for the Respondent submitted that Mrs S. Veerasamy reported the dispute in 2014 which is more than 3 years after her retirement. He also referred to the *Code Civil Mauricien*, namely *Article 2279* thereof, which precludes anyone from making a claim after 3 years. In determining from when time starts to accrue, he referred to the date when the Disputant retired in July 2011. He submitted that the present claim is time-barred in law. Counsel also stated that the Disputant cannot make piecemeal claims to the Tribunal or to any court of law. It would be an abuse of process of the Tribunal for the Disputant not to claim everything she is supposed to be entitled to at the same time.

In referring to paragraph 11 of the Disputant’s Statement of Case wherein a prayer for an order *‘directing the Respondent to instruct the SICOM to adjust the Applicant’s pension benefits, …*’ has been made, Counsel submitted that what the Disputant is asking is in the nature of specific performance; and that the Tribunal has no jurisdiction to entertain same. Specific performance is an equitable remedy, as is an injunction, and may be granted by a court with jurisdiction to grant equitable remedies. He also referred to *section 11 (2)* of the *Courts Act* in support of his contention and to the judgment of *B.* *Bundoo v R. Baichoo* [*1979 SCJ 13*].

Counsel has also described the claim of the Disputant as being one of money which would concern a court of law, which in his opinion would be the *Industrial Court*, and that the Tribunal cannot have jurisdiction in matters concerning the *Industrial Court*.

Counsel for the Disputant has, on the other hand, conceded that if the *Act* were to be strictly applied, the Disputant has gone over the three years. However, it is only last year that the Disputant became aware of how her pension was being computed and that her years of service was reckoned from 1977 instead of 1970 following which she called at *SICOM* requesting for a breakdown. It was further pointed out that the issue of time-bar was not canvassed before the *CCM* despite the Respondent having many opportunities to come up with the objection. Referring to the principles of natural justice that the Tribunal may have regard to under *section 97* of the *Act*, it is not fair on the Disputant for the objection to be taken now.

Counsel for the Disputant also submitted that she disagreed that the *Code Civil* finds its application here inasmuch as there is an Act, namely the *Employment Relations Act*, which has already catered for this issue. She submitted that the issue of time-bar was not raised before the *CCM*, it already has the status of a dispute which has been referred to the Tribunal under *section 69 (7)* of the *Act*. She also referred to *section 70 (2)* of the *Act* in support of her submissions as well as to the decision of the *Judicial Committee of the Privy Council* in *Toumany and anor v Veerasamy* [*2012*] *UKPC 13*, wherein the courts of Mauritius have been encouraged to be less technical and more flexible in their approach to jurisdictional issues.

The main issue raised by the plea *in limine* is in relation to whether the dispute is time-barred. The present matter has been referred to the Tribunal pursuant to *section 69 (7)* of the *Act*. This reads as follows:

*Where no agreement is reached in the case of a labour dispute reported by an individual worker, the Commission may, within 7 days, with the consent of the worker, refer the labour dispute to the Tribunal for arbitration.*

(The underlining is ours)

It has not been disputed that the dispute brought by Mrs S. Veerasamy was initially reported to the *CCM* on 28 October 2014 as per the referral letter from its *Ag. President*. The relevant aspect of the referral letter reads as follows in relation to the report of the dispute:

*On 28 October 2014, Mrs. Soopamah Veerasamy reported to the President of the Commission for Conciliation and Mediation the existence of a labour dispute between herself and the Mauritius Educational Development Company Ltd (MEDCO) in presence of the Private Secondary Schools Authority (PSSA) as per section 64(1) of the Employment Relations Act (Act No.32 of 2008) as amended.*

It is amply clear that the matter reported by the Disputant is in the nature of a labour dispute under the *Act*. The term ‘labour dispute’ has been defined under *section 2* of the *Act*:

***2. Interpretation***

*In this Act, unless the context otherwise requires -*

…

*“labour dispute” –*

1. *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 underlining is ours)

For the purpose of the present arguments, it is apposite to note that the meaning of a labour dispute has expressly excluded a dispute reported more than three years. This limitation period of three years to report a labour dispute as from the act or omission which gave rise to it must be given its proper purpose.

In *Donovan v Gwentoys Ltd [1990] 1 WLR 472*, as has been cited by *S. Sime* in *A Practical Approach to Civil Procedure*, *3rd edition*, Lord Griffiths stated the following in relation to the purpose of a limitation period:

*The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is a claim with which he never expected to have to deal*.

It would also be pertinent to note the comments of *S. Sime (supra)* on the nature of a limitation period:

*Expiry of a limitation period provides a defendant with a complete defence to an action.*

*If a claim is brought a long period after the events in question, the likelihood is that evidence which may have been available earlier may have been lost, and the memories of witnesses who may still be available will inevitably have faded or become confused. Further, it is contrary to general policy to keep people perpetually at risk.*

Likewise, the following may be noted from *Prescription Extinctive* in *Dalloz* *Répertoire de Droit Civil*, *Tome IX* on the nature and basis of the ‘*prescription extinctive*’ which is to be found in the *Titre Vingtième*, *Chapitre Cinquième*, *Section Troisième* of the *Code Civil Mauricien*:

*Elle résulte du non-exercice des droits par leurs titulaires, pendant un certain délai. L’extinction du droit se manifeste par la perte de l’action en justice contre laquelle une exception peut alors être opposée. Elle se justifie par l’intérêt d’ordre public et de sécurité juridique qu’il y a d’empêcher des procès devenus difficiles à juger ou inopportuns par suite du temps écoulé, alors que, par ailleurs, l’inaction prolongée du titulaire du droit constitue une négligence grave.*

It may also be noted that *Article 2219* of the *Code Civil Mauricien* defines a prescription as follows:

*La prescription est un moyen d’acquérir ou de se libérer par un certain laps de temps, et sous les conditions déterminées par la loi.*

Following the submissions by Counsel for the Disputant, it has not been denied that the present dispute has been reported about a month or so after the three year limitation period provided under *section 2* of the *Act*. However, it has been argued that the issue should have been raised before the *CCM* where the dispute was reported.

It cannot be overlooked that the *President* of the *CCM* has a discretion to reject the report of a labour dispute under *section 65* of the *Act*. The relevant part of this section states as follows:

***65. Rejection of labour disputes***

*(1) The President of the Commission may reject a report of a labour dispute made under section 64 where he is of the opinion that –*

*(a) the dispute is not a labour dispute or does not comply with section 67;*

Despite, the discretionary power of the *President* of the *CCM* to reject the report of a labour dispute under *section 65* of the *Act*, it does not appear whether any objection was taken to the mediation and conciliation of the dispute before that instance. As has been previously observed, the *CCM* has referred the matter to the Tribunal on 14 May 2015 in accordance with *section 69 (7)* of the *Act* with the consent of the worker after no settlement was reached between the parties.

The present objection having been raised before the Tribunal, it would be pertinent for the Tribunal to determine same inasmuch as the referral made to the Tribunal under *section 69 (7)* of the *Act* is one of a labour dispute as has been defined under the *Act* and is relevant to the jurisdiction of the Tribunal to enquire into the dispute and thereafter make an award thereon.

The Tribunal has noted that the Disputant retired on 11 July 2011. However, despite having signed a retirement form on 24 June 2011 and thereafter received payment of her lump sum in her bank account on 24 August 2011 and for her pension on 1 September 2011, she was unaware that her pension benefits had been calculated as from 1 January 1977 instead of 1 January 1970. She proceeded abroad to England following her retirement in July and in the following years to 2014. She only became aware of the issue regarding her pension benefits in 2014 around September. It should also be noted that she reported another labour dispute regarding vacation leave to the *CCM* on 29 October 2012 despite being in the U.K. over the last three years.

Notwithstanding the obiter in *M.* *Toumany & anor v M. Veerasamy* (*supra*) to the effect that courts should be encouraged to be less technical and more flexible in relation to jurisdictional matters, the evidence of the Disputant has amply shown that it is through her own inadvertence that the present labour dispute was not reported within the three years which gave rise to its act or omission. The more so that she had reported another dispute against her employer in 2012.

The Tribunal therefore cannot find the present dispute referred is a labour dispute within the meaning of the law.

The Respondent having succeeded on the first limb of its objection, it is not necessary for the Tribunal to give its determination on the second point raised *in limine*. However, it would suffice to say that upon the referral of a labour dispute, the Tribunal is bound to arbitrate on same within its terms of reference; contrary to which any award issued by the Tribunal would be *ultra petita* the terms of reference of the labour dispute (vide *Baccus v The Permanent Arbitration Tribunal* [*1986 MR 272*]; and *Lucien v* *The Permanent Arbitration Tribunal* [*1994 SCJ 224*]).

The present matter is therefore set aside.

**(Sd) Shameer Janhangeer**

**(Vice-President)**

**(Sd) Vijay Kumar Mohit**

**(Member)**

**(Sd) Jay Komarduth Hurry**

**(Member)**

**SD Georges Karl Louis**

**(Member)**

**Date:** **11th September 2015**