EMPLOYMENT RELATIONS TRIBUNAL

RULING

ERT/RN 120/15

Before

Indiren Sivaramen	**Vice-President**
Ramprakash Ramkissen	**Member**
Denis Labat	**Member**
Khalad Oochotoya	**Member**

In the matter of:-

Mr Yousouf Ibne Abdulla Cheddy (Disputant)

And

Ministry of Labour, Industrial Relations, Employment & Training (Respondent)

The above case has been referred to the Tribunal for arbitration in terms of Section 69(7) of the Employment Relations Act 2008 (the "Act"). The terms of reference read as follows:

"1) "Whether the Ministry of Labour, Industrial Relations, Employment and Training should submit the proposals for restructuring of the Specialist Support Services Unit to the Public Sector Re-engineering Bureau of the Ministry of Civil Service and Administrative Reforms for an in-depth study;

2) Whether the Ministry of Labour, Industrial Relations, Employment and Training has committed a wrong (faute) when it considered that the funds provided in the Estimates 2008-2009 would not be sufficient to meet a full financial year's salary for the post of Head, Specialist Support Services but only 4 months salary in view of the revision in salary by the Pay Research Bureau Report 2008, although it is noted that for the implementation of Pay Research Bureau Reports the Ministry of Finance and Economic Development provides additional funds to meet the increase in salaries upon appropriate request being made;

3) Whether the Ministry of Labour, Industrial Relations, Employment and Training has committed a wrong (faute) by postponing the filling of the post of Head, Specialist Support Services in the year 2009 by informing the Public Service Commission officially, with a copy of the official request to the Ministry of Finance and Economic Development, to stay action with respect to the filling of the post of Head, Specialist Support Services; and

4) Whether the Ministry of Labour, Industrial Relations, Employment and Training should accede to my request for compensation to the prejudice caused to me by making the effective date of my promotion to the post of Head, Specialist Support Services be on or around 19 March 2009 instead of 1st October 2010."

Respondent has raised preliminary objections which read as follows:

"The Respondent avers that –

(a) point (1) of the present dispute is premature in that the Public Sector Re-engineering Bureau of the Ministry of Civil Service and Administrative Reforms has not yet been set up;

(b) points (2) and (3) of the present dispute are not within the jurisdiction of the Tribunal as Disputant is claiming redress for alleged "wrong" (faute) by the Respondent;

(c) the remedy sought in point (4) is not a remedy within the jurisdiction of the Tribunal;

(d) point (4) is an indirect way of appealing against a decision of the Public Service Commission (appointment of Disputant to the post of Head, Specialist Support Services) and such appeal lies within the jurisdiction of the Public Bodies Appeal Tribunal;

(e) points (2), (3) and (4) of the dispute are time barred;

(f) all interested parties have not been put into cause despite reference having been made to "Co-Respondents" in the Statement of Case of Disputant;

(g) the dispute does not comply with section 64(2) of the Employment Relations Act.

In the circumstances, Respondent moves that the dispute be set aside.

The Disputant was assisted by a trade unionist whilst the Respondent was assisted by counsel. The Tribunal heard arguments on the preliminary objections and in fairness to Disputant allowed his trade unionist to make a statement on his behalf. Counsel for Respondent called two witnesses to adduce some evidence for the purpose of the preliminary points raised and Disputant's representative was allowed to put questions to them.

The Tribunal has examined the evidence adduced, arguments of counsel and the statement made by the trade unionist. The unchallenged evidence adduced was to the effect that the Public Sector Re-Engineering Bureau falling under the purview of the Ministry of Civil Service and Administrative Reforms has not yet been set up even

though the relevant Ministry has already initiated actions for the setting up of the said Bureau.

There was also evidence adduced from the representative of Respondent that Respondent was waiting for the setting up of the Public Sector Re-Engineering Bureau to submit its proposals. Documents were also produced in relation to Disputant's appointment in a temporary and ultimately substantive capacity as Head, Specialist Support Services (Docs B and B1).

Point 1 of the dispute as drafted is clearly premature since the relevant Public Sector Re-Engineering Bureau has not yet been set up. Indeed, an award in terms of whether proposals for restructuring of the Specialist Support Services Unit should be submitted to that specific bureau is being sought by the Disputant. However, there is more to it in that the Disputant is seeking an award which is of a declaratory nature. The Tribunal has on numerous occasions highlighted that it does not generally give declaratory awards (**vide Mr Ugadiran Mooneeapen and Mauritius Institute of Training and Development, ERT/RN 35/12** and **Mr Abdool Rashid Johar and Cargo Handling Corporation Ltd ERT/RN 93/12**). Moreover, an award of a declaratory nature will serve no purpose in relation to point 1 of the dispute when the Public Sector Re-Engineering Bureau has not yet been set up. This is not and cannot obviously be an action against the appropriate body or bodies (as per the terms of reference) for the setting up of the Public Sector Re-Engineering Bureau. In any event, there is evidence that actions have already been initiated by the relevant Ministry for the setting up of the said Bureau. There is also no suggestion that Respondent will not submit the proposals once the Public Sector Re-Engineering Bureau is set up.

Also, the proposals for the restructuring of the Specialist Support Services Unit shall still require an in-depth study and are certainly not yet terms and conditions of employment of the Disputant.

For the reasons given above, point 1 of the present dispute is set aside.

The Tribunal proposes to deal with the preliminary objections in relation to points 2 and 3 of the present dispute together. Once again, the Disputant is seeking declaratory awards under both points and we fail to see how a declaration (if at all possible) that the Respondent has committed "a wrong (faute)" can by any stretch of the imagination be an implied term of the contract of employment of Disputant (as per section 72(1)(e) of the Act). The statement made by the trade unionist that "wrong" should be given its ordinary dictionary meaning is not very helpful either. In any event, the terms of reference under both points refer to "committed a wrong (faute)" and there are descriptions of acts which allegedly constitute the wrong. The Tribunal has no hesitation in finding that the Disputant is asking the Tribunal through the said terms of reference to award that the Respondent has committed a "faute".

"Labour dispute" is defined in the Act as

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 disputes under points 2 and 3 do not relate wholly or mainly (underlining is ours) to wages, terms and conditions of employment of Disputant, promotion, allocation of work between workers and group of workers, reinstatement or suspension of Disputant's employment. The disputes under points 2 and 3 as drafted are not labour disputes and are not within the jurisdiction of the Tribunal. They are thus set aside.

As regards point 4 of the dispute, the Tribunal will first consider the preliminary objection to the effect that the dispute is 'time barred'. The definition of 'labour dispute' under section 2 of the Act has been amended by Act No. 5 of 2013 (with effect from 11 June 2013) so as to add that a 'labour dispute' does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute. The issue of a dispute reported more than three years after the act that gave rise to the dispute has been extensively considered in the cases of **Mrs Dineshwaree Ramyead-Banymandhub And Air Mauritius Ltd, ERT/RN 15/15** and **Mr Rama Valaydon And Cargo Handling Corporation Ltd, ERT/RN 49/13**.

The Tribunal will here quote from the case of **Mrs Dineshwaree Ramyead-Banymandhub (above)**, where the Tribunal stated the following:

The amendment brought to the Act by Act No. 5 of 2013 has amended the definition of "labour dispute" under section 2 of the Act by expressly removing from the ambit of "labour dispute" "a dispute that is reported more than three years after the act or omission that gave rise to the dispute". "Labour dispute" is now defined in the Act as:

"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)… ;
(c) does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute.

*Thus, irrespective of whether a "créance" is uncertain or indeterminate (vide **L.B Veerasamy v. Quality Beverages Ltd 2013 IND 12**), this Tribunal cannot enquire into*

a dispute which is reported more than three years after the act or omission giving rise to the dispute. Sections 64 and 67 of the Act contain provisions which deal with "Reporting of labour disputes" and "Limitation on report of labour disputes" respectively. In this particular case, the act or omission which gave rise to the dispute arose in 2001 and the dispute was reported only on 18 December 2014 to the Commission for Conciliation and Mediation ("the Commission"). Clearly, the dispute was reported more than three years after the act or omission giving rise to the dispute.

At this stage, the issue is whether the amendment brought to the definition of "labour dispute" in the Act by Act No. 5 of 2013 can indeed apply in the present matter. Counsel for Disputant has argued that the amendment brought to the law cannot be applied in the present case since it will affect directly the right of the Disputant. Counsel argued that at the material time, the cause of action existed for Disputant and that the 2013 amendment Act cannot take away that right of the Disputant with retrospective effect. The Tribunal will here quote extensively from the Supreme Court case of ***R. D`Unienville & Anor. v Mauritius Commercial Bank 2013 SCJ 404*** *where the Court stated:*

17.19 *It is still helpful however to refer to the French doctrine which does not depart in essence from what obtains in other jurisdictions to which reference has been made above.*
The following passages from ***Aubry & Rau, Droit Civil Français, Vol. 1 para. 30 p. 101*** *explains the application of the principles relating to "retroactivité des lois" and explains in particular the distinction to be made in that connection between "droits acquis" and "simples expectatives":*

"En principe, toute loi nouvelle s'applique même aux situations et rapports juridiques établis ou formés dès avant sa promulgation. Ce principe est une conséquence de la souveraineté de la loi et de la prédominance de l'intérêt public sur les intérêts privés."

"Les avantages concedés par la loi seule ne forment, à moins qu'ils ne se rattachent comme accessoires legaux a un droit principal irrevocablement acquis, que de simples expectatives tant que l'evenement ou le fait auquel (elle) en subordonne l'acquisition ne s'est point realisé, et sont jusque-là susceptible d'être enlevés par une loi posterieure. Après l'accomplissement de cet évènement ou de ce fait, ils revètent le caractère de droits acquis"

The following note from ***Dalloz Repertoire Pratique Vo Lois et Decrets*** *also explain the difference to be drawn between "simples expectatives" and "droits acquis".*

*"**167.** on admet generalement en doctrine et en jurisprudence que la loi nouvelle peut modifier les* ***simples expectatives*** *resultant d'actes ou de faits* ***anterieurs****, mais ne peut pas porter atteinte aux* ***droits acquis,****…. …"*

The concept is not different from what had been formulated by the Privy Council in ***Director of Public Works v Ho Po Sang [1961] AC (901)*** *with regard to the*

determination of an acquired right: "It must be a right which is acquired and/or has accrued and not a "mere hope" that the right will be acquired at some future time if certain events occur". The right must have become vested by the date of repeal i.e it must not have been a mere right to take advantage of the enactment now repealed.

18. When is there an "acquired right"?

The whole basis of the plaintiffs' claim rest upon the fact that they had already acquired, under the provisions of the Income Tax Act 1995, a right to tax-free interest which had accrued to them prior to its repeal by the Finance Act 2006, with effect from 1 July 2006. It was submitted that the plaintiffs had availed themselves of the right to tax-free interest since they had made all the deposits in compliance with all the conditions laid down under the Income Tax Act prior to its repeal in 2006 and they had thus acquired a right under the repealed legislation, in respect of the whole of the term of the deposits, which had not in any way been taken away by the amending legislation.

***18.1** The legal basis of the plaintiffs' claim for their "acquired right" is founded on **section 17(3)(c) of the Interpretation and General Clauses Act** which was enacted in 1974 and which was first introduced in our law by Section 11 of **the Interpretation and Common Form Ordinance 1898**. This section was borrowed from English legislation, more precisely Section 38 of the Interpretation Act 1889 which provided that where an Act is repealed "The repeal shall not affect any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment so repealed". It is abundantly clear that the legal principles governing the operation of retrospective tax legislation in the various comparable jurisdictions, to which we have referred earlier, rejoin substantially the principles enunciated under English Law. The protection against interference with "acquired" or "vested" rights by the operation of retrospective legislation in these jurisdictions formulate in essence what are contained in the provisions of **Section 17(3)(c) of our Interpretation and General Clauses Act** which, as it has been seen, has been borrowed from the English legislation on the subject.*

***18.2** A right however does not automatically accrue or is vested in any person merely because of the existence of a legal right under the repealed legislation. In **Hamilton Gell v White 1922 2K.B. 422** the Court (Atkin L.J) explained that **section 38 of the English Interpretation Act 1889** "only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute". The Court referred to the following extract from **Abbott v Minister of Lands [1895 AC 425] at p 431**:*

"The mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment without any act done by an individual towards availing himself of that right, cannot properly be deemed to be a "right accrued" within the meaning of the enactment".

***18.3** What would constitute in law an "acquired right" or "vested" right was also extensively examined by the Supreme Court of Canada in the case of **Dikranian v Quebec (Attorney-General) 2005 SCC 73**. The Canadian Interpretation Act spells out*

in its Section 12, in terms which are comparable to section 17(3)(c) of our Interpretation and General Clauses Act, that "The repeal of an act shall not affect rights acquired …. And the acquired rights may be exercised …. notwithstanding such repeal". The Court re-affirmed that the principle against interference with vested rights has long been accepted in Canadian law [Para. 32, 33]. It added that these presumptions against interference with vested rights and the presumption against retroactive legislation "were designed as protection against interference by the state with the liberty or property of the subject. Hence, it was "presumed", in the absence of a clear indication in the statute to the contrary that Parliament did not intend prejudicially to affect the liberty or property of the subject."

18.4 *The Court however went on to state that in order to determine the existence of a vested right with respect to the duration of the exemption period, the following conditions must exist:*

1. The right must be vested in a specific individual whose legal situation must be "tangible, concrete and distinctive" rather than general and abstract. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists;
2. Vested rights result from the crystallisation of the party's rights and obligations. This legal situation must have been sufficiently constituted and materialized at the time of commencement of the new statute; and
3. If retroactivity is not specified it cannot be imposed. It is presumed, in the absence of a clear indication in a statute to the contrary in the light of the entire context that the legislature did not intend to violate the principle against interference with vested rights.

The present matter can be distinguished from the case of ***Mr Rama Valaydon And Cargo Handling Corporation Ltd, RN 49/13*** *where the disputant had already reported a dispute to the President of the Commission before the 2013 amendment to the definition of "labour dispute" came into force. In that case, the Tribunal referred extensively to relevant case law on the matter including the Supreme Court cases of* ***The Director of Public Prosecutions v Sewprasad Ramrachheya 2009 SCJ 434*** *and* ***R. D`Unienville & Anor (above)*** *and the judgment of their Lordships of the Privy Council in the case of* ***Yew Bon Tew and anor v Kenderaan Bas Mara ([1982] 3WLR 1026, [1983] 1 AC 553****). The Tribunal came to the conclusion that the subsequent amendment to the law could not impair the vested right or legitimate expectation of the disputant to have his already duly reported labour dispute dealt with in accordance with the previously existing law, that is, proceed to arbitration, after same was referred to the Tribunal by the Commission. There was already crystallisation of the disputant's rights and obligations. By reporting his dispute before the amendment to the law, Mr Valaydon could not be deprived of a "legal situation which was sufficiently constituted and materialized" (****vide R. D`Unienville & Anor (above)****), at the time of the commencement of the amended provision*.

In the present case, ex facie the terms of reference (under point 4 of the dispute) and Docs B and B1, the act that gave rise to the dispute under point 4 occurred on or

around 19 March 2009 or at latest on 1 October 2010, that is, the date of appointment of Disputant. There is no evidence that Disputant reported any dispute at or around those dates. The amendment brought to the Act on 11 June 2013 excluded from the ambit of 'labour dispute' a dispute that is reported more than three years after the act that gave rise to the dispute. As per the letters of referral, the Disputant reported the dispute to the Commission only on 29 December 2014. Though Disputant had the possibility of reporting a dispute under point 4 before the amendment to the law, yet he did not crystallise this right. He sat on his rights all this time and had a "mere possibility of availing himself of a specific statute". This is not a case where he had a vested right to report his dispute. There was no crystallisation of Disputant's rights and obligations. By reporting the dispute only in December 2014, the Disputant was reporting a dispute more than three years after the act that gave rise to the dispute. Point 4 of the present dispute is thus not a 'labour dispute' and does not fall within the jurisdiction of the Tribunal.

Secondly, the power to appoint persons to hold or act in any offices in the public service vests in the Public Service Commission (**section 89 of the Constitution**). Though this power may be delegated in certain circumstances, the power still vests in the Public Service Commission and point 4 of the dispute as styled cannot lie against a mere Ministry (**vide Miss Marie Karen Ladouceur And The State of Mauritius as represented by Ministry of Health & Quality of Life i.p.o of Ministry of Civil Service & Administrative Reforms, ERT/RN 90/13; Mr Lindsay Wilson And Municipal Council of QuatreBornes i.p.o 1. Local Government Service Commission 2. Pay Research Bureau, ERT/RN 104/13**).

Point 4 of the dispute is thus also set aside. At this stage, the Tribunal wishes to make two observations in relation to the referral of the dispute by the Commission to the Tribunal. Firstly, in the letters of referral (both dated 30 June 2015) the Respondent is referred to as the Ministry of Labour, Industrial Relations, Employment & Training. The Disputant, in his Statement of Case, has referred to the Respondent as being "The State of the Republic of Mauritius as represented by The Ministry of Labour, Industrial Relations, Employment & Training".

In the case of **Devanand Bagha And Ministry of Education, Culture & Human Resources, RN 1023**, the Tribunal whilst referring to the Supreme Court case of **The Government General Services Union v. Mr Harris Balgobin & Ors SCJ 338 of 1994**, ruled that the Ministry of Education, Culture & Human Resources was not the "Employer" and the case was set aside. In the case of **The Government General Services Union (above)**, the Supreme Court stated the following:-

Although, as indicated earlier, the applicant reported the dispute against the only person whom it could, by law, cite in the matter, namely the employer, that is the Government of Mauritius, and the parties consistently referred to the Government in their written statements and submissions, the Tribunal, incorrectly, described the other party as "The Minister of Civil Service Affairs & Employment" in the "interlocutory findings" and, in its award, as "The Ministry for Civil Service Affairs and Employment". This has, as can be

seen, caused unnecessary complications, besides not being in accordance with the law. Neither a Minister, nor a Ministry, is an employer, and it is for the Government not the Tribunal to determine how and by whom it should be represented.

The duty of the Commission to see to it that disputes are referred to the Tribunal with the proper parties has been reiterated in a series of cases including in the recent case of **Dr Sailush Sookmanee and State of Mauritius, i.p.o Pay Research Bureau, ERT/RN 17/15**.

Secondly, in one letter dated 30 June 2015, the Commission expressed its views that the points in dispute 2, 3 and 4 were time barred. However, since the Disputant did not want to remove the above points, the Commission referred all the points in dispute to the Tribunal.

In the case of **Mr Purussram Greedharee And (1) Mauritius Ports Authority (2) Cargo Handling Corporation, ERT/RN 258/11**, the Tribunal stated the following:

Section 69 *provides for the procedure to be followed where an agreement has been reached following conciliation or mediation before the Commission.* ***Subsection (7)*** *to that section makes provision where no agreement has been reached in the case of a labour dispute reported by an individual worker whereby the Commission may, within 7 days, with the consent of the worker, refer the labour dispute to the Tribunal for arbitration.*

We find no provision in the Employment Relations Act that allows the Commission to divert from this one and only referral procedure. The Commission after attempting to reach a settlement which, it is understood, took place after hearing the case for each party entitled to be a party to the dispute and weighing the strength of each one case may decide to refer the matter for arbitration. The law allows a discretion to be exercised judiciously before any matter is referred for arbitration. Such referral will be complete if the worker or employee gives his assent to it. But it can in no circumstances be at the request of the worker or the employee.

Although ***paragraph 15 of the Second Schedule in Part IV of the Employment Relations Act 2008*** *reads:-*

"The Tribunal, the Commission or the Board may conduct its proceedings in a manner it deems appropriate in order to determine any matter before it fairly and promptly and may deal with the substantial merits of such matter with a minimum of legal formalities,"

the specific provision enacted by Parliament with respect to a labour dispute referral for arbitration cannot be digressed.

In ***Mrs Rungee and the Municipal Council of Quatre Bornes (ERT/RN 64/10)****, the Tribunal observed:-*

"We need to draw the attention of the President of the Commission for Conciliation and Mediation once again of the provisions laid down in ***Section 69(7) of the Employment Relations Act 2008:-***

"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."

It was not for Mrs B. Rungee to request the Commission to refer the dispute to the Employment Relations Tribunal for arbitration. Since no agreement had been reached, the Commission had a discretion, which is to be exercised judiciously, to refer the dispute to the Tribunal with the consent of the worker. (Vide Award of ***L. Saleegram and New Educational College, i.p.o. Private Secondary School Authority [RN 22/10]****)."*

The need for the Commission to satisfy itself of the existence of a labour dispute is essential and a referral that contains two parties as being the Employer as couched in the Terms of Reference clearly indicates that the Commission effected a lock, stock and barrel exercise instead of a proper screening and weighing of the strength or weakness of the complaint and identifying the "Employer".

…

Terms of Reference which emanate from the Commission for Conciliation and Mediation remain a basis on which labour disputes are examined. The Tribunal will be unable to proceed with labour disputes unless the Terms of Reference are in order.

For the reasons given above in relation to the preliminary objections taken, all the points in dispute are set aside.

(Sd) Indiren Sivaramen
Vice-President

(Sd) Ramprakash Ramkissen
Member

(Sd) Denis Labat
Member

(Sd) Khalad Oochotoya
Member **7 September 2015**