EMPLOYMENT RELATIONS TRIBUNAL

JUDGMENT

ERT/RN 176/15

Before:

Rashid Hossen	– President
Sounarain Ramana	– Member
Jay Komarduth Hurry	– Member
Renganaden Veeramootoo	– Member

In the matter of :-

1. **Ashok Seesaghur**
2. **Kripanund Mathon**
3. **Hemraj Thakooree**

Appellants

And

1. **Rodrigues Educational Development Co. Ltd (REDCO) ex H.S.C College Building Citron Donis Rodrigues**
2. **Rodrigues College Development Co. Ltd (RODCO) of Port Mathurin**
3. **Rodrigues Commission for Conciliation and Mediation of Barclays Street, Port Mathurin, Rodrigues**

Respondents

In the Presence of: -

1. **Private Secondary School Authority (PSSA) of Sir Francis Herschenroder Street, Beau Bassin, Mauritius**
2. **Ministry of Education and Human Resources of MITD House, Phoenix, Mauritius (service on the Chief Executive)**

Co-Respondents

This is an appeal against the decision of the President of the Rodrigues Commission for Conciliation and Mediation declaring an application for a referral of a labour dispute among the abovenamed parties to the Employment Relations Tribunal by virtue of Section 66(1) of the Employment Relations Act 2008 as amended.

Appellants and Rodrigues Commission for Conciliation and Mediation were represented by Counsel.

In support of their application, the Appellants aver:-

- An application made to the Employment Relations Tribunal by the first three Applicants was withdrawn on 18th February 2011 because the Ministry of Education and Human Resources was not put into cause.

- On or about 28/07/2011 and 15/10/2011 the labour dispute was again reported to the Rodrigues Commission for Conciliation and Mediation (RCCM) to refer the Applicants' labour dispute to Employment Relations Tribunal.

- On 08/03/12, the RCCM gave a report advising the parties to refer the labour dispute for voluntary arbitration under section 63 of the Employment Relations Act 2008.

- The advice given by the RCCM could not be implemented because the Applicants' employers declined to co-operate for a voluntary arbitration.

- On 06/05/2012 and 24/05/2012 and thereafter the applicants requested the RCCM to refer the labour dispute to Employment Relations Tribunal under section 69 (7) of the Employment Relations Act 2008.

- The RCCM gave a report on 02/08/12 informing the Applicants that it will not proceed any further with their case according to Section 67 (b) of the Employment Relations Act 2008.

  The Appellants then appealed to the ERT as the said report was wrong and unlawful inasmuch as there was no determination by the ERT and the RCCM of the Appellant's dispute. The appeal was set aside by the Employment Relations Tribunal.

- The Appellants applied for leave for judicial review of the decision of the ERT and RCCM to be granted to the Appellants.

- The Supreme Court observed that by the lapse of time (2 years), the Appellants remedy which would have been closed to them under section 67 of the Employment Relations Act has become available to them thereby. The Judicial Review case had no "raison d'être" and the Appellants withdrew the judicial review case.

- On 12/01/2015, following the Supreme Court judgment, the Appellants reported the labour dispute again to the RCCM.

- On 27/02/2015, the RCCM drew the Appellants' attention to section 64(2) of the Employment Relations Act 2008 which reads as follows:-

  "No dispute referred to in sub-section (1) shall be reported except after meaningful negotiation has taken place between the parties and a state of deadlock has been reached".

- The Appellants complied with the remark made by the RCCM and as there was no response from the employers of the Appellants of any move for a negotiation, the stage of a deadlock was reached and the RCCM was informed of same and requested to refer the dispute to ERT as prescribed by law.

- After a lapse of 8 months since the date of request for a referral to ERT was made (12/01/2015), the RCCM has on (08/09/2015) refused unlawfully to refer the labour dispute to the ERT on the alleged ground that there is no labour dispute which need to be referred to ERT (Report RCCM A5/14) (Annex B).

The Appellants are aggrieved by and dissatisfied with the said Report of RCCM A5/14 dated 08/09/2015 and hereby appeal to the ERT in order that the refusal of the RCCM to refer their dispute to ERT be quashed, set aside or otherwise dealt with for the following grounds:-

1. The Rodrigues Commission for Conciliation and Mediation has wrongly and unlawfully set aside their application for a referral of their labour dispute to Employment Relations Tribunal on the erroneous ground that in an alleged similar case between other parties, the Supreme Court has rejected an application for Judicial Review (Annex C) and as such there is no labour dispute which needs to be referred to E.R.T.

   (i) The Appellants aver that they were not a party to the case of Mr. V. Lillah and as such it is not binding on them (vide Jdt No. 166 of 2015). Their case differs from that of V. Lillah.

   (ii) They have always expressly retain and reserve their acquired right quoad fringe benefits both as regards Professor V. Torul Report (01/12/2009) and the Report of the Pay Research Bureau 2013 while opting for the new terms and conditions laid down both in the Prof. V. Torul Report of the PRB report. Their acceptance of the 2 reports were "without prejudice of their acquired rights to fringe benefits".

2. The Rodrigues Council of Mediation and Conciliation erroneously decided on the merits of the case instead of referring their labour dispute to E.R.T. and as such the decision of the RCCM is ultra-vires, unjust and unreasonable inasmuch as the RCCM assumed the

jurisdiction of the E.R.T. and wrongly declared that there is no labour dispute and this without observing the Rules of Natural Justice.

In response to the Applicants' grounds of appeal, the Rodrigues Commission for Conciliation and Mediation asserts:-

- In or around February 2009, certain educators in Rodrigues complained that Educators from Mauritius posted in Rodrigues were entitled to additional allowances. The Rodrigues Regional Assembly then decided to review and rationalize benefits enjoyed by the educators coming from Mauritius and posted in Rodrigues as from 1st July 2009.

- On 26th May 2009, the Board of Rodrigues Educational Development Co Ltd (hereinafter referred to as "REDCO"), employer of all members of the Secondary School Teachers' Association of Rodrigues (hereinafter referred to as "SSTAR") informed its Educators that the decision of the Rodrigues Regional Assembly will be implemented with effect from 1st July 2009. Following several meetings with stakeholders, the decision was not implemented. On 16th September 2009, the Government of Mauritius appointed Professor V. P. Torul as mediator in this matter to look into the case of the Mauritian educators employed in Rodrigues with a view to finding an acceptable solution with regard to their terms and conditions of employment (hereinafter referred to as "Mediator").

- On 7th December 2009, the Mediator issued his report to the Ministry of Education. In January 2010, the Government endorsed the Mediator's recommendations, one of which was to allow a moratorium period of 3 years that is up to 31st December 2012, before implementing the recommendations. The main thrust of the recommendations was to remove the benefits that were granted to Educators coming from Mauritius and permanently domiciled in Rodrigues. That report shows that there was a general consensus amongst the parties and that all stakeholders agreed, *inter alia*, with a view to bring parity, fairness and justice, that the Mauritian educators on permanent establishment be given that moratorium of 3 years.

- On 10th November 2010, the Applicants reported a labour dispute to the Rodrigues Commission for Conciliation and Mediation against their employer, REDCO, the main point, being whether REDCO could lawfully and unilaterally remove or curtail the benefits favoured on Educators coming from Mauritius who were posted in Rodrigues. The Respondent started conciliation with the aggrieved Educators and REDCO/RODCO Management but no conciliation could be achieved and a deadlock was reached. On 8th December 2010, the Respondent, with the consent of parties, decided to refer the dispute to the Tribunal for arbitration under section 69(7) of the Act. On 8th February 2011, at the hearing of the Tribunal, the case was withdrawn by the Applicants.

- In November 2011, that is 12 months only after the dispute had been reported to the Respondent, Mr. Kripanud Mathon JEEWON, the

Applicant No. 2, reported a labour dispute to the Respondent in his capacity as the President of the SSTAR on the same facts and issues.

- In a report dated 8th March 2012, the then President of the Respondent suggested and advised the parties to the dispute to refer the dispute voluntarily to the Employment Relations Tribunal as provided for by section 63 of the Act. The Respondent was subsequently informed that the Employer was not willing to follow such course of action.

- On the 6th May 2012, the SSTAR requested that the labour dispute be referred to the Tribunal under section 69(7) of the Act.

- On 2nd August 2012, the Respondent gave a report indicating to the Applicants that their labour dispute could not be entertained according to Section 67(b) of the Employment Relations Act 2008, as the same issue cannot be reported as labour dispute within 24 months from the date of determination of the dispute.

- On 9th August 2012, the Applicants appealed against the decision of the Respondent before the Employment Relations Tribunal. Pursuant to a ruling delivered on 27th September 2012, the Employment Relations Tribunal decided that given the functions of the Tribunal as specified under the Act, there is no specific right of appeal provided under the Act in relation to a decision taken under section 67 (b) of the Act. Furthermore, the Tribunal, in view of its jurisdiction, was not the proper forum to challenge the decision of the Respondent. Thus, the

preliminary objection raised by the Respondent before the Tribunal was upheld and the appeal set aside.

- On the 18th October 2012, the Applicants applied for judicial review. During the course of the proceedings, on the 16th September 2014, the Applicants withdrew their application. The statement was made by the Applicants' Counsel:-

"notwithstanding his stand against the decisions of respondents No 1 and 3, namely the Rodrigues Commission for Conciliation and Mediation (RCCM) and Employment Relations Tribunal, which decision will be challenged, the applicants reckoned that with the passing of time, the remedy which would have been closed to them under Section 67 of Employment Relations Act had now become available anew; thus, making this application for Judicial Review redundant with the availability of another remedy".

- On 11th December 2014, the Applicant No. 2 reported a similar dispute before the Respondent. The terms of reference are as follows:-

(i) whether their terms and conditions of employment have been changed without their consent;

(ii) whether the fringe benefits that they have been entitled since 1995 have become their acquired rights;

(iii) whether the Torul's report is not binding because they did not sign an acceptance form;

- By letter dated 27th February 2015, addressed to the Applicants individually, the Respondent drew their attention to section 64 (2) and (3) of the Act, which reads as follows:

  "(2) No dispute referred to in subsection (1) shall be reported, except after meaningful negotiations have taken place between the parties and a stage of deadlock has been reached.

  (3) The period of negotiations shall not exceed 90 days from the start of negotiations or such longer period agreed in writing between the parties."

- In the present case, there is no evidence of a meaningful negotiation other than the Applicants informing the Respondent of the refusal of their employer to negotiate with them.

- In the meantime, the Respondent was notified of a judgment made in a similar case by the Supreme Court dated 26th May 2015 i.e. in the matter of *V. Lillah v/s The Honourable Minister of Education 2015 SCJ66*.

- The matter was an application for leave made before the Supreme Court on 25th March 2013 to apply for a Judicial Review of the decision of the Honourable Minister of Education to repeal with effect from 1st January 2013, a circular letter dated 17th April 1989 relating to fringe benefits (rent allowance, disturbance allowance, return air tickets and gratuity) payable to the teaching staff domiciled in Mauritius and employed in a secondary school in Rodrigues.

- The leave was refused and the application was set aside with costs. The relevant parts of the judgment read as follows:-

"That report of the mediator (i.e. Professor V. Torul) was never challenged by the applicant or any other person. On the contrary the applicant enjoyed the benefit of that report as from 01 January 2010."

- On 8th September 2015, the Commission found that there is no labour dispute on the basis that the Disputants, on the authority of *Lillah*, equally benefitted from the moratorium period of three years from the report of Professor V.P. Torul regarding fringe benefits (rent allowance, disturbance allowance, return air tickets and gratuity). In the light of the remarks of the Supreme Court, the Respondent was of the view that there is no labour dispute to be considered or to be referred to the Employment Relations Tribunal. The dispute, if any, has already been decided by the Supreme Court, and therefore the question of referring a dispute to the Employment Relations Tribunal does not arise.

The Tribunal drew the attention of both Counsel to what it considers to be a procedural defect in the lodging of this appeal. Section 66(1) of the Employment Relations Act 2008 as amended provides:-

"(1) Any party aggrieved by a rejection of the dispute under section 65 may, within 21 days of the date of the notice under section 65(3), appeal against the rejection to the

> *Tribunal and the Tribunal shall, on hearing the appeal, confirm or revoke the decision of the President of the Commission."*

This section must be read in line with Section 69(7) of the same Act and which reads:-

> *"(7) 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."*

With the exception of a voluntary arbitration, the Rodrigues Commission for Conciliation and Mediation can only refer a labour dispute to the Tribunal for arbitration where it has been reported by an individual worker. The present appeal emanates from the three Appellants altogether. Furthermore, it is directed against the Rodrigues Educational Development Company Ltd and the Rodrigues College Development Company Ltd as well as the Rodrigues Commission for Conciliation and Mediation. Ideally, it is for each Appellant to lodge an appeal separately against the rejection of the dispute by the President of the Rodrigues Commission for Conciliation and Mediation. We make allowance for the fact that Counsel for the Appellants only stepped in at a later stage although they were being assisted by an Attorney from the initial stage. Also, we have been informed that Appellants No. 1 and 2 reside in Rodrigues and given the time constraint laid down by the statutory provision to hear this appeal, curing the defect appeared impossible. We are therefore

prepared to go beyond this technical aspect and deal with the main substance of this appeal which is whether a review of the decision of the President of the Commission for Conciliation and Mediation in Rodrigues is called for.

It is apposite to refer to what the Privy Council held in what is known as the Mango Tree judgment **(Margaret Toumany and John Mullegadoo v Mardaynaiken Veerasamy) [2012] UKPC 13**:

> *"23. The Board has sought in the past to encourage the courts of Mauritius to be less technical and more flexible in their approach to jurisdictional issues and objections....."*

We will now deal with the decision of the President of the Commission for Conciliation and Mediation. We pause here to remind the Respondent that there was no need for a decision to reject a labour dispute to be delivered by the President flanked with his members. As per Sections 65(1) and 99(3) of the Act this was a matter to be decided by the President of the Rodrigues Commission for Conciliation and Mediation. This is not fatal however as the President formed part of the panel delivering Report RCCM A514. There was at most surplusage to have other members. According to the RCCM the provision laid down in Section 64(2) of the Employment Relations Act 2008 as amended has not been followed i.e. the requirement of reporting a dispute only after meaningful negotiations have taken place between the parties and a stage of deadlock has been reached. The President's decision is also based on a judgment delivered by the Supreme Court in May 2015 in V. Lillah versus The Honourable Minister of Education and Rodrigues College. It was an

application for leave to apply for a judicial review of the decision of the Ministry of Education to repeal with effect from January 2013, a circular letter dated 17 April 1989 relating to fringe benefits payable to the teaching staff domiciled in Mauritius and employed in secondary schools in Rodrigues. The Rodrigues Commission for Conciliation and Mediation has noted that there are similarities between V. Lillah's case and the Appellants' labour dispute. He added that in the said judgment, the Supreme Court emphasized on Mr Torul's report whereby there was a general consensus among the parties. An agreement was reached among all stakeholders with a view to bring parity, fairness and justice so that Mauritian staff on permanent establishment should be given a moratorium period of three years with effect from 1st January 2010 to enjoy all the fringe benefits. As in the case of V. Lillah, the Appellants have enjoyed the benefits of the contents of the report as from January 2010. The President concluded that there is no labour dispute to be considered and referred to the Employment Relations Tribunal. We fully endorse the view taken by the President of the Commission for Conciliation and Mediation in Rodrigues.

Suffice it to repeat what the Chief Justice and Chan Kan Cheong, Judge, said in the V. Lillah's case (Supra).

> *"That report of the mediator was never challenged by the applicant or any other person. On the contrary the applicant enjoyed the benefit of that report as from 01 January 2010. The applicant is accordingly, by his conduct, debarred from challenging by way of judicial review the contents of the report*

which have in fact superseded the contents of the circular letter of 17 April 1989 as from 01 January 2010....." (Underlining is ours)

This appeal is dismissed.

(Sd) Rashid Hossen
(President)

(Sd) Sounarain Ramana
(Member)

(Sd) Jay Komarduth Hurry
(Member)

(Sd) Renganaden Veeramootoo
(Member)

12 January 2016