EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 49/15, ERT/RN 50/15, ERT/RN 51/15, ERT/RN 52/15, ERT/RN 53/15, ERT/RN 54/15, ERT/RN 55/15, ERT/RN 56/15, ERT/RN 57/15, ERT/RN 58/15, ERT/RN 59/15, ERT/RN 60/15, ERT/RN 61/15, ERT/RN 62/15, ERT/RN 63/15, ERT/RN 64/15, ERT/RN 65/15, , ERT/RN 66/15, ERT/RN 67/15, ERT/RN 68/15, ERT/RN 69/15, ERT/RN 70/15, ERT/RN 71/15, ERT/RN 72/15, ERT/RN 73/15, ERT/RN 74/15, ERT/RN 75/15, ERT/RN 76/15, ERT/RN 77/15, ERT/RN 78/15, ERT/RN 79/15, ERT/RN 80/15, ERT/RN 81/15, ERT/RN 82/15, ERT/RN 83/15, ERT/RN 84/15, ERT/RN 85/15, ERT/RN 86/15, ERT/RN 87/15, ERT/RN 88/15, ERT/RN 89/15, ERT/RN 90/15, ERT/RN 92/15, ERT/RN 93/15, ERT/RN 95/15, ERT/RN 96/15, ERT/RN 97/15, ERT/RN 98/15, ERT/RN 99/15, ERT/RN 102/15, ERT/RN 103/15, ERT/RN 104/15, ERT/RN 105/15, ERT/RN 106/15, ERT/RN 107/15, ERT/RN 108/15, ERT/RN 109/15, ERT/RN 110/15, ERT/RN 111/15, ERT/RN 112/15, ERT/RN 113/15, ERT/RN 114/15, ERT/RN 115/15.

Before:	**Indiren Sivaramen**	**-**	**Vice-President**
	Soonarain Ramana	**-**	**Member**
	Khalad Oochotoya	**-**	**Member**

In the matter of:-

Mr Noomesh Ramdhony and others (Disputants)

And

Road Development Authority (Respondent)

in presence of:
Ministry of Public Infrastructure & Land Transport (Co-Respondent)

The above sixty-three cases have been referred by the Commission for Conciliation and Mediation ("the Commission") to the Tribunal for arbitration in terms of Section 69(7) of the Employment Relations Act 2008 (the "Act"). All the cases have been consolidated and all the parties were assisted by Counsel. The terms of reference are the same in all the cases and read as follows:

"Whether I should be reinstated in my former post as General Worker at the Road Development Authority."

The Tribunal has already delivered a ruling in the present matter setting aside a plea in limine raised on behalf of the Respondent whilst adding that the plea in limine as taken was, at best, premature.

Mr Foolell deposed on behalf of all the Disputants and he explained that he received a letter from the Respondent requesting him to attend an interview for the post of General Worker. The Disputants attended the interview and were selected. They were each requested to submit a certificate of character. Finally, they received their offers of employment as General Worker and they had to report for duty on 10 November 2014. They also had to undergo a medical test. On 30 March 2015 they received a letter informing them that their employment would be terminated. They were paid one month wages in lieu of notice. Mr Foolell averred that no reason was given for the termination of their employment. He mentioned a letter emanating from Co-Respondent where reference was made to a code of conduct whereby public officers were reminded that they should not recruit workers in a pre-election period. He also referred to a circular dated 31 October 2014 emanating from the Public Service Commission. Mr Foolell stated that the employment of the Disputants had been wrongly terminated and prayed that they be reinstated in their post as General Worker.

In cross-examination, Mr Foolell stated that he can read English. He agreed that the letter of employment mentioned that his employment in the first instance would be on a purely casual basis for a period one year. He did not agree however that the contract was on a temporary basis. To a question from Counsel for Co-Respondent, he agreed that he had not received any letter from Co-Respondent.

Ms Mookhith deposed on behalf of Respondent and she stated that the offers of employment made to the Disputants were on a purely casual basis, that is, on a temporary basis. She averred that there was no obligation on the part of the Respondent to keep the Disputants in employment for a period of one year. When referring to paragraph 5 of the letter of appointment (Annex C to Disputants' Statement of Case), she added that there was no mention that Respondent had to provide reasons for terminating such a contract. She stated that Respondent adhered to the condition mentioned in the letter of appointment and paid one month's wages in lieu of notice.

In cross-examination, Ms Mookhith stated that it was following a letter from the Co-Respondent relaying a decision of Cabinet that the matter was referred to the Board of

Respondent. The Board then decided to terminate the employment to comply with Government's decision. The Respondent has followed all the procedures to recruit these casual General Workers following a letter from the Ministry to recruit General Workers. It has also followed all the procedures to terminate their employment following Cabinet's decision. There were no adverse reports against the Disputants since the Respondent had not yet asked for ad hoc reports on them. Ms Mookhith agreed that the 'enlistment procedure' started prior to 28 August 2014 and the exercise leading to the offer of employment was completed on 31 October 2014.

Mrs Auckbaraullee then deposed on behalf of the Co-Respondent and she stated that the role of the Co-Respondent was limited to transmitting the Cabinet decision to the Respondent. She also referred to a circular letter dated 15 October 2014 which would have been circulated to all parastatal bodies falling under the aegis of Co-Respondent by way of a letter dated 21 October 2014. She was however not aware when the Public Service Commission Circular No 2 of 2014 dated 31 October 2014 (Annex G to Disputants' Statement of Case) was circulated to the Respondent. When cross-examined by Counsel for Respondent, Mrs Auckbaraullee stated that the letter dated 22 May 2015 emanating from Co-Respondent (Annex F to Disputants' Statement of Case) was not inconsistent with Co-Respondent's initial letter of 24 March 2015 (relaying Cabinet's decision).

The Tribunal has examined all the evidence on record including the submissions of all Counsel. It is apposite to go back to the ruling delivered earlier in the same matter. The Tribunal had ruled as follows: "*Ex facie the terms of reference <u>only</u> (underlining is ours), it is not possible to say whether the dispute falls within the jurisdiction of the Industrial Court and not that of the Tribunal. Also, it is not enough for the terms of reference to fall within the jurisdiction of the Industrial Court. The dispute must fall within the exclusive jurisdiction of the Industrial Court to oust the jurisdiction of the Tribunal. Evidence will have to be adduced and the statements of case filed by the relevant parties will have to be analysed. The plea in limine as taken is, at best, premature and is set aside …"*. The plea in limine which was taken read as follows: "*The Employment Relations Tribunal has no jurisdiction to hear the present matter in as much as the terms of reference as couched would fall within the jurisdiction of the Industrial Court."* The Tribunal can now refer to Statements of Case produced and has the benefit of all the evidence adduced. The present matter concerns clearly cases where the employment of each of the disputants has been terminated by the Respondent.

The Tribunal has no jurisdiction to hear a dispute which concerns directly the termination of a contract of employment or contract of service except in the case of "reduction of workforce" as specifically provided for under section 39B of the Employment Rights Act. In the case of "reduction of workforce", the matter is dealt with by a special division of the Tribunal which is the Employment Promotion and Protection Division. This division is constituted differently from a panel of the Tribunal hearing a labour dispute under the Act. Also, a "reduction in workforce" case may only be referred to the Tribunal under section 39B of the Employment Rights Act by the Permanent

Secretary of the Ministry of Labour, Industrial Relations, Employment and Training. Termination of employment is dealt with under Part VIII of the Employment Rights Act and by virtue of Section 3 of the Industrial Court Act, it is the Industrial Court which has exclusive (underlining is ours) jurisdiction to try any matter arising out of the Employment Rights Act (save for the special jurisdiction granted to the Tribunal under section 39B of the Employment Rights Act). The jurisdiction of the Tribunal to order reinstatement of a worker in his former job following the termination of his contract of employment has already been considered by the Tribunal in a series of cases (**vide Miss Mahentee Boolakee and Central Electricity Board, ERT/RN 10/13; Mr Sheryad Hosany and Cargo Handling Corporation Ltd, ERT/RN 40/13; Mr Suraj Dewkurun and Gamma Materials Ltd, ERT/RN 70/13; Mrs Hemowtee Salaye Meetoo and Mauritius Broadcasting Corporation, ERT/RN 195/15**).

The Tribunal will refer to an award delivered recently in the case of **Mrs Hemowtee Salaye Meetoo (above)**, where the Tribunal quoted extensively from the other cases cited above. The Tribunal quoted from the case of **Mr Suraj Dewkurun (above)** as follows:

"***Ruling – Mr Suraj Dewkurun and Gamma Materials Ltd (ERT/RN 70/13)***

*"The issue of reinstatement following the termination of a contract of employment by an employer has already been considered by the Tribunal (**vide Mr Sheryad Hosany v Cargo Handling Corporation Ltd RN 40/13 and Miss Mahentee Boolakee v Central Electricity Board RN 10/13**). Part VIII (Termination of Agreement) of the Employment Rights Act includes sections 36, 37 and 38 of the said Act which, according to Counsel for the Disputant, have been breached in the case of Disputant. These are matters to be thrashed out before the Industrial Court. We will refer again to the Employment Rights (Amendment) Act 2013 for guidance. In the case of **Mr Sheryad Hosany (above)**, the Tribunal stated the following:*

One of the objects for the amendments to the law, as stated on the Explanatory Memorandum to the Employment Rights (Amendment) Bill which later became the Employment Rights (Amendment) Act 2013, was with a view to "introducing the concept of reinstatement in cases of unfair termination of employment on grounds of redundancy, discrimination and victimisation for participation in trade union activities."

"Reinstatement" in former employment may now be ordered following the recent amendments brought to the law. However, such an order may only be made in a limited number of cases. Section 46 (5B) (above) provides that the Industrial Court may where it finds that the termination of employment of a worker, who has been in continuous employment for a period of not less than 12 months with an employer, is effected on the ground of the worker's race, colour, caste, national extraction, social origin, pregnancy, religion, political opinion, sex, sexual orientation, HIV status, marital status or family responsibilities or by reason of the worker becoming or being a member of a trade union

or otherwise participating in trade union activities, the Court may, with the consent of the worker, order that that worker be reinstated in his former employment.

Though we bear in mind that this dispute was reported to the CCM on 20 February 2013 (as per the letter of referral), that is, before the coming into force of the Employment Rights (Amendment) Act 2013 on 11 June 2013, there is nothing to suggest that the Tribunal had jurisdiction prior to those amendments to order reinstatement following the termination of a contract of employment/service. Indeed, under section 71 of the Employment Relations Act 2008 the Tribunal could not enquire into any labour dispute where the dispute relates to any issue within the exclusive jurisdiction of the Industrial Court. The Tribunal thus in the case of ***Mr Sheryad Hosany (above)*** *stated the following in relation to the term "reinstatement" as mentioned in the definition of 'labour dispute' at section 2 of the Employment Relations Act :*

The only plausible interpretation of the words "reinstatement or suspension of employment of a worker" in the definition of "labour dispute" at section 2 of the Employment Relations Act would thus be that they relate to claims for reinstatement following a suspension or following a "rétrogradation" which may be a form of disciplinary sanction and whereby the disputant before the Tribunal would be seeking reinstatement in his former post. Such an interpretation would also be in line with the "in pari materia" canon of statutory interpretation where the meaning of an ambiguous statute may be determined in light of other statutes on the same subject matter (The Employment Rights Act and Industrial Court Act).

The Tribunal added the following:

Reinstatement in one's former employment is provided for, as stated above, only in a few specific cases under the Employment Rights Act itself and apart from cases of reduction of work force, it is our view that the Tribunal has no jurisdiction to order reinstatement of a worker in his former employment. As rightly pointed out by Counsel for Respondent, such a dispute would involve considering the fairness of the dismissal, the procedure adopted and the reasons put forward by the employer for the dismissal. This is beyond the jurisdiction of the Tribunal which has only been given jurisdiction (with the new amendments to the law) in relation to termination of a contract of employment where there is reduction in workforce.

It is apposite to note that the legislator whilst enacting the Employment Relations Act 2008 which has repealed the former Industrial Relations Act has brought amendments to the definition of disputes which may be heard before the Employment Relations Tribunal (as renamed from the former Permanent Arbitration Tribunal). "Industrial dispute" under the old Industrial Relations Act meant a dispute between an employee or a trade union of employees and an employer or a trade union of employers which relates wholly or mainly to […] the termination or suspension of employment of an employee. In our view, the word 'termination' had been deliberately removed from the definition of 'labour dispute' in the Employment Relations Act 2008 (the obvious reason being to avoid conflicts of jurisdiction) so that the last part of the definition would read "reinstatement or suspension of employment of a worker".

Also, if the Tribunal was to find that it had jurisdiction prior to The Employment Rights (Amendment) Act 2013 to order reinstatement of a worker in the case of termination of a contract of employment, this would lead to absurd results. Indeed, the Employment Rights (Amendment) Act 2013 would be wrongly interpreted as now restricting the right of workers for reinstatement in only a few specific cases where termination is effected on one of the grounds mentioned above, instead of introducing (underlining is ours) the concept of reinstatement in cases of unfair termination of employment on the grounds mentioned. Similarly, there would have been no need to introduce the concept of reinstatement in cases of unfair termination of employment on the ground of redundancy since a worker would always (even in a case of reduction of workforce) have been able to report a dispute seeking reinstatement following the termination of his employment. Such an interpretation is clearly untenable."

We wish to add that the inclusion of the word 'reinstatement' in the definition of labour dispute in the Employment Relations Act 2008, as amended, is not confined to the Employment Relations Tribunal. The Act covers the jurisdiction of the National Remuneration Board and the Commission for Conciliation and Mediation. Nothing prevents the latter for example to deal with cases of reinstatement in its attempt to conciliate parties. In the same breath, the Tribunal may, with agreement of parties, delve into issues of reinstatement even after a dismissal or termination of employment has taken place.

Much has been said by Counsel for the Disputant regarding the equitable jurisdiction of the Tribunal. We hold that the powers of the Tribunal are derived from the statutory provisions laid down in the Employment Relations Act 2008, as amended and the Tribunal does not have any inherent power, equitable or otherwise.

We conclude that the legislator would have made it clear and in no uncertain terms if it intended to empower the Tribunal to deal with issues of reinstatement after termination of a contract of employment."

Though the Tribunal may have jurisdiction in relation to the reinstatement of a worker in his former post following a "rétrogradation" for example or may hear a dispute in relation to the terms and conditions of employment of a worker following his reinstatement (which itself would have been agreed between the parties), the Tribunal has no jurisdiction to order the reinstatement of a worker after the termination of his contract of employment. The only exception would be in the case of "reduction of workforce" which is specifically provided for under section 39B of the Employment Rights Act.

For the reasons given above, all the cases are set aside.

(sd) Indiren Sivaramen **(sd) Soonarain Ramana** **(sd) Khalad Oochotoya**

Vice-President **Member** **Member**

5 April 2016