EMPLOYMENT RELATIONS TRIBUNAL

RULING

ERT/RN 163/15, 164/15, 165/15, 166/15, 167/15, 168/15, 169/15, 170/15

Before:	**Indiren Sivaramen**	**-**	**Vice-President**
	Ramprakash Ramkissen	**-**	**Member**
	Rabin Gungoo	**-**	**Member**
	Renganaden Veeramootoo	**-**	**Member**

In the matter of:-

Mr Sunny Dawon and others (Disputants)

And

Mauritius Institute of Training and Development (Respondent)

In presence of **: Mr Komul Prasad Ramdass (Co-Respondent)**

The above eight cases have been referred by the Commission for Conciliation and Mediation (CCM) to the Tribunal for arbitration in terms of Section 69(7) of the Employment Relations Act 2008 (the "Act"). As per the referral, all the disputes were reported to the President of the CCM on 19 November 2014. The Disputants and Respondent were assisted by Counsel whilst the Co-Respondent did not wish to be assisted by Counsel and intimated to the Tribunal that he would adopt a neutral stand in the matter. All the cases which raise similar issues have been consolidated for the purposes of this ruling following a joint motion made by counsel for Disputants and Respondent. The terms of reference are quite similar in all the cases (except for names

and details such as appointment/confirmation dates specific to each individual worker) and read as follows in cases ERT/RN 163/15, 165/15 and 166/15:

"Whether I, …, Training Officer recruited in …. and appointed in a substantive capacity in ….. [prior to 2014 in all the cases] *by the MITD should be granted incremental credits on my salary, similar to Mr Komul Prasad Ramdass, to restore my seniority placing with respect to my colleague Mr Komul Prasad Ramdass who was recruited on contract in 2012, appointed in a substantive capacity in 2014 and granted 12 incremental credits above the initial salary, or otherwise."*

In the cases ERT/RN 164/15, 167/15, 168/15, 169/15 and 170/15, the terms of reference read as follows:

"Whether I, …, Trainer recruited in …. and confirmed in ….. [prior to 2014 in all the cases] *by the TSMTF (presently MITD)* [and directly by the MITD in case ERT/RN 167/15] *should be granted incremental credits on my salary, similar to Mr Komul Prasad Ramdass, to restore my* [term "*relative*" added here in cases ERT/RN 168/15 and ERT/RN 169/15] *seniority placing with respect to my colleague Mr Komul Prasad Ramdass who was recruited on contract in 2012, appointed in a substantive capacity in 2014 and granted 12 incremental credits above the initial salary, or otherwise."*

Counsel for Respondent has taken a point in limine litis which reads as follows:

"Respondent moves that the present dispute be set aside inasmuch as it is not a 'labour dispute' within the definition of the Employment Relations Act as the Disputant has already signed the option form for his remuneration as per the PRB Report 2013."

The Tribunal has heard arguments from both Counsel on the point in limine litis. The Tribunal concluded in a series of cases (**vide Miss Mahentee Boolakee And CEB, ERT/RN 10/2013; Mr Sheryad Hosany And Cargo Handling Corporation Ltd, ERT/RN 40/13; Mrs Marie Karen Ladouceur And The State of Mauritius, ERT/RN 90/13; Mrs Soopamah Veerasamy And Mauritius Educational Development Co Ltd , i.p.o 1. PSSA 2. SICOM, ERT/RN/39/2015; Mrs Dineshwaree Ramyead-Banymandhub And Air Mauritius Ltd, RN 15/15**) that it had no jurisdiction to hear a dispute which was not a labour dispute even though the dispute had been referred to him by the Commission for Conciliation and Mediation. Indeed, to have jurisdiction to hear a dispute, the Tribunal must be in presence of a labour dispute as defined in the Act. The Tribunal is not empowered under the Act to hear other disputes under sections 69(7) (or even under section 63 – voluntary arbitration) and 70(1) of the Act. We may even refer to an old ruling delivered in the case of **Mrs Chandrawatee Mala Tatiah And Development Bank of Mauritius, RN 758** where the then Permanent Arbitration Tribunal stated the following in relation to the need to have an 'industrial dispute' (under the now repealed Industrial Relations Act) for the Tribunal to inquire in the dispute:

"The Tribunal wishes to address itself first on whether once a referral is made, it is bound to adjudicate on the dispute. Indeed Section 83 of the Industrial Relations Act 1973 as amended states "Where any dispute is referred to the Tribunal by the Minister under section 82, the Tribunal shall, with all diligence, inquire into the dispute and make an award on it". Section 5 of the ***Interpretation and General Clauses Act*** *defines "shall" as "may be read as imperative". (The underlining is ours).*

Are we to hear any dispute referred to us by the Minister if the Tribunal finds that the dispute does not fall within the legal parameters of an industrial dispute as per the Industrial Relations Act 1973 as amended?

Russell on Arbitration*, 18th Edition by Anthony Walton Q.C. at page 73 reads:*

"It can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. However, an arbitrator is always entitled to inquire whether or not he has jurisdiction. ***(see Brown v. Oesterreichischer Waldbesitzer R.G.m.b.h. (1954) (Q.B.8)*** *An umpire faced with a dispute whether or not there was a contract from which alone his jurisdiction, if any, deal with the matter at all and leave the parties to go to the court, or he can consider the matter and if he forms the view that the contract upon which the claimant is relying and from which, if established, alone his jurisdiction can arise is in truth the contract, he can proceed accordingly.* ***(Per Roskill J. in Lunada Exportadora and others v. Tamari and Sons and Others (1967) L. Lloyd's Rep. 353 at page 364)."***

The Tribunal concedes therefore that whenever a compulsory arbitration is referred to it, it has no choice than to inquire into the dispute provided it satisfies the Tribunal that it is an industrial dispute."

If a dispute which is not a labour dispute as per the Act is referred to the Tribunal for arbitration, the Tribunal will have no jurisdiction to hear that dispute.

"Labour dispute" is defined (as amended at the time the disputes were reported to the President of the Commission) in section 2 of 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."

Counsel for Respondent has relied on a judgment delivered by the Civil Service Arbitration Tribunal (as it was then called) in the case of **Y.Ramkhelawon And Minister of Civil Service Affairs & Administrative Reforms, RN 138**. As rightly conceded by Counsel herself, this judgment was delivered on 31 May 2006 when the now repealed Industrial Relations Act was still in force. Under the Industrial Relations Act, industrial disputes (and not labour disputes) were referred to the then Permanent Arbitration Tribunal (or Civil Service Arbitration Tribunal in the case of the public service). The definition of 'industrial dispute' (under the Industrial Relations Act) was slightly different from the present definition of 'labour dispute'. Indeed, previously the dispute would not be an industrial dispute if (subject also to other conditions which are not directly relevant here) it related to those provisions of a contract of employment or a procedure agreement which concern remuneration or allowance of any kind and apply to the employee as a result of the exercise by him of an option to be governed by the corresponding recommendations made in a report of the Pay Research Bureau. Now, the definition is somewhat different in that a 'labour dispute' 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 (…) in relation to remuneration or allowances of any kind. However, the Tribunal is of the opinion that there is no material change as far as the relevant proviso in each case is concerned.

The Tribunal will refer to the Supreme Court judgment in the case of **Federation of Civil Service and Other Unions and others v. The State of Mauritius and Anor, 2009 SCJ 214.** The Supreme Court stated the following:

Prior to the amendment to the Industrial Relations Act (IRA) effected by Act No. 13 of 2003, any public officer or employee could, immediately after opting to accept the revised emoluments and terms and conditions of service set out in a new report of the PRB, declare an industrial dispute in relation to remuneration or allowances of any kind and the Minister was statutorily required to promote a settlement of the dispute by, amongst others, referring it to the Civil Service Arbitration Tribunal (CSAT) or causing the Civil Service Industrial Relations Commission to make an investigation into the dispute.

However, following the publication of the PRB Report of 2003 in June of that year and before it became operative as from 01 July 2003, that avenue was no longer open to any such public officer or employee. The IRA was amended by Act No. 13 of that year so as to exclude from the definition of an "industrial dispute" any dispute between

an employee and an employer relating to those provisions of a contract of employment or a procedure agreement which –

> *"(i) concern remuneration or allowance of any kind; and*
>
> *(ii) apply to the employee as a result of the exercise by him of an option to be governed by the corresponding recommendations made in a report of the Pay Research Bureau."*

The plaintiffs have accordingly brought an action for constitutional redress claiming that their fundamental rights as guaranteed by the Constitution are being contravened.

…

We have to say that we heard this case after the National Assembly had in August 2008 passed the Employment and Labour Relations Act 2008. That Act, which was made to come into force on 02 February 2009, has repealed the IRA but has maintained the same exclusion from the definition of "labour dispute" – which has now replaced "industrial dispute" – as was to be found in the IRA as amended by Act No. 13 of 2003. Indeed section 2 of the Employment and Labour Relations Act 2008 provides that the labour dispute "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 in relation to a remuneration or allowances of any kind". [underlining is ours]

…

We may straightaway say that ***ad hominem*** *legislation* ***per se*** *should not be struck down unless it is unconstitutional. Accordingly, in the present case, we have scrutinised the new provisions in the light of the evidence placed before us as to the economy of the law. We note that they are designed as an improvement of the general law and affect a large swathe of the workforce in Mauritius. They came into force before the PRB report of 2003 became operative. They were not given any retroactive effect. They were meant to speak for the future and have applied to those who opted for the recommendation of the PRB report of 2003. We take judicial notice of the fact that they have equally applied to those public officers who opted to be governed by the recommendations made in the PRB report of 2008 which became operative with effect from 01 July 2008. We also note that as at today the new provisions are still on the Statute book and will continue to affect some one hundred thousand of public officers and other employees of local authorities, the secondary education sector and a number of parastatal bodies.*

…

It was submitted on behalf of the plaintiffs that the new provisions have denied them the opportunity, following the declaration of an industrial dispute, of having their grievances heard and adjudicated upon by bodies set up by statute and that accordingly the new provisions have breached the principle of separation of powers as well as their right to the protection of the law. We do not agree. On the coming into operation of a new PRB report, whether before or after the new provisions became effective, every public officer or employee was and continues to be free to choose whether to opt to be governed by the recommendations of the new report. Should he opt not to be governed by the recommendations in the new report, he is at liberty to declare an industrial dispute, now referred to as a labour dispute, pursuant to the provisions of the law – formerly the Industrial Relations Act and now the Employment and Labour Relations Act 2008. Should he of his own free will, however, opt to be governed by the recommendations in the new report, he is presumed like any citizen to know the law, including the new provisions, and cannot declare a dispute in relation to his remuneration or allowances. In the circumstances the complaint that the new provisions amount to a legislative judgment meant to deprive the employees to whom they apply of their legal rights or that they have taken away the plaintiffs' constitutional right to the protection of the law is without foundation. [underlining is ours]

In the case of **Y.Ramkhelawon (above)**, the matter was described in the grounds of appeal as follows:

The appellant was granted two increments in August 2000 for higher qualifications. When the recommendations of the PRB were being implemented in July 2003 the Ministry of Civil Service Affairs excluded the two increments granted to the appellant from his salary, with the result that as from 1 July 2003 his salary does not include the two increments. As from 1 July 2003 the appellant is drawing the salary he would normally have drawn but without the two increments granted to him previously.

The Respondent averred that the dispute was in relation to remuneration as a result of the option exercised by Appellant to be governed by the salaries and conditions of service of the PRB Report 2003 and therefore did not constitute an industrial dispute.

The Permanent Arbitration Tribunal held that:

An increment is an increase related to the basic salary and may be given for higher qualifications. It is therefore concerned with "remuneration or allowance of any kind" and the very fact of signing the option form in favour of the PRB report 2003 deprives the appellant the right to declare the industrial dispute. "Remuneration" is defined in the ***Labour Act*** *as:*

"remuneration"
"(a) means all emoluments earned by a worker under an agreement;
(b) includes –
(i) any sum paid by an employer to a worker to cover expenses incurred in relation to the special nature of his work; and
(ii) any money to be paid to a job contractor, for work by the person employing the job contractor;
(c) does not include money due as a share of profits"

The Tribunal thus found the decision of the relevant Minister to reject the dispute on the ground that it is not a dispute within the meaning ascribed to it in the Industrial Relations Act as then amended to be correct.

In the case of **T.S.M. Cunden & 5 others And Technical School Management Trust Fund, RN 1028,** the Tribunal whilst referring to the Supreme Court judgment in the case of **Federation of Civil Service and Other Unions and others (above)**, ruled that "*The present matter is with regard to a dispute over "salary" as stipulated in the Terms of Reference and the Applicants having signed the option form to the PRB report, they are debarred from declaring a dispute over it.*"

In the case of **Government General Services Union (GGSU) And Government of Mauritius, RN 975**, the Tribunal had to deal with the following disputes:

"Item of Dispute 1 ***Grant of Incremental Credits for additional qualifications to Mr. Nand JHOOTTEE***

…

Item of Dispute No. 3 ***Grant of Responsibility allowance to Mr. Cabeeraze RAMKISSOON***

Item of Dispute No. 1

Grant of Incremental credits for additional qualifications to Mr. Nand JHOOTTEE

It is the contention of the Union that Mr. Nand Jhoottee, Establishment Officer posted to the National Development Unit possesses the ***Graduateship of the Institute of Chartered Secretaries and Administrators*** *and he should be granted incremental credits for additional qualifications.*

…

Item of Dispute No. 3

Grant of Responsibility Allowance to Mr. Cabeeraze RAMKISSOON

> *It is the contention of the Union that Mr. Cabeeraze RAMKISSOON, Clerical Officer/Higher Clerical Officer, was required to be responsible for the sub-store at the Finance Division of the Ministry of Education between 01 July 1998 and 02 February 2000 and he should be paid a responsibility allowance for shouldering higher responsibilities during this period.*

Dispute No. 2 had been withdrawn.

Page 3 of the Ruling of the Tribunal reads as follows: *The Respondent, the Government of Mauritius raised a point in **limine litis** to the effect that this matter cannot be heard before the Tribunal as there is no industrial dispute as such. Counsel for the State submitted that it is on record that the Applicant has opted for new salary and conditions of service governed by the Pay Research Bureau Report of 2003 and 2008 and they are therefore bound by what they have signed and the agreement they have entered into. Counsel stated that he was resting his argument upon the determination of the Tribunal in the case of **Cunden and 5 Others and Technical School Management Trust Fund [RN1028]** delivered on the 13th of November 2009 where according to him the same point was raised when an Applicant has opted for new salary and conditions as governed under the P.R.B. Report and it was said that the Applicant was debarred from raising an industrial dispute once he has opted for new salary and conditions of service.*

Counsel appearing for the Union submitted *that it is not the case before the Tribunal that the option is being challenged. What is being challenged is the recommendations made in the PRB Report that must be implemented. It is the implementation of those recommendations that is in issue. ….. The workers are not challenging the fact that they have signed and agreed with the exercise of an option but what they expected the employer to do with the implementation of those recommendations is what is the subject matter before the Tribunal.*

The Tribunal ruled as follows:

*We would also demarcate from what we held in **T.S.M. Cunden and Others and Technical School Management Trust Fund (RN 1028 of 13.11.2009)** to the extent that **Cunden** (Supra) was in relation to salary directly whereas the present matter relates firstly to a qualification issue regarding the first dispute and a responsibility issue with regard to the second one. Likewise, we would distinguish the present matter with the case of **Y. Ramkhelawon and Minister of Civil Service Affairs and Administrative Reforms (P.A.T. Judgment RN 138 of 31.05.2006)** where the*

Appellant conceded in his grounds of appeal that the dispute relates to additional increments.

A "labour dispute" is defined in the Employment Relations Act 2008 as follows:-

> *"(a) means a dispute between a worker, or a recognized 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,* [not]*withstanding 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 in relation to remuneration or allowances of any kind."*

It is our view that the disputes before us are in relation to qualification and responsibility which may have a bearing incidentally on increment.

The objection is accordingly overruled.

The terms of reference thus have to be examined carefully before deciding whether there is indeed a labour dispute before the Tribunal. In the present case, the disputes are clearly in relation to incremental credits, that is, "remuneration or allowances of any kind" of the disputants. There is no qualification or responsibility issue. It is conceded by disputants that the remuneration package including Pay, Conditions of Service and Benefits of employees of Respondent are governed by the PRB reports (paragraph 3 or 6 under part A of their statements of case). Also, all the disputants have accepted in their statements of case that they have signed option forms for PRB whereby they have agreed to the revised emoluments and all terms and conditions of service in the report. The present disputes have been reported on 19 November 2014 well after the PRB Report 2013. The disputants indeed refer specifically to recommendations of the PRB Report 2013 and Errors, Omissions and Anomalies Committee Report – PRB 2013 in their statements of case and aver the following at paragraph 3 (paragraph 4 or 5 in some cases) under part C of the said statements of case:

3. "I have always signed options forms for PRB whereby I agreed to the revised emoluments and all terms and conditions of service in the report, which is binding on all the parties."

The present disputes are directly related to "remuneration or allowances of any kind" of the disputants and made as a result of the exercise of options to be governed by the

recommendations made in a report of the PRB. The disputes are not labour disputes as defined under the Act and are thus set aside.

SD Indiren Sivaramen

Vice-President

SD Ramprakash Ramkissen

Member

SD Rabin Gungoo

Member

SD Renganaden Veeramootoo

Member

18 January 2016