EMPLOYMENT RELATIONS TRIBUNAL

RULING

Consolidated cases

ERT/ RN 52/17, ERT/ RN 53/17, ERT/ RN 54/17, ERT/ RN 55/17

Before

Indiren Sivaramen	**Vice-President**
Francis Supparayen	**Member**
Abdool Feroze Acharauz	**Member**
Ghianeswar Gokhool	**Member**

In the matter of:-

Mr Louis Rudolph Rose (Disputant No 1)

And

Mauritius Cane Industry Authority (Respondent)

Mr Paul Patrick Fanfan (Disputant No 2)

And

Mauritius Cane Industry Authority (Respondent)

Mr Jonee Bhukoo (Disputant No 3)

And

Mauritius Cane Industry Authority (Respondent)

Mr Louis Antoine Lemettre (Disputant No 4)

And

Mauritius Cane Industry Authority (Respondent)

The above four 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 referrals, all the disputes had been reported to the President of the CCM on 24 August 2016. The disputants and Respondent were assisted by Counsel before this Tribunal. All the cases which raise similar issues have been consolidated following a motion made by counsel for disputants and to which there was no objection on the part of Respondent. The terms of reference in all the cases read as follows:

"Whether the piece rate should be increased by 27% as recommended by Edge Consulting Report 2014 effective as from 1st of July 2013 instead of 15% as wrongly adjusted by the Mauritius Cane Industry Authority (Sugar Storage Handling Unit, ex. Bagged Sugar Storage and Distribution Co. Ltd."

The Respondent has taken a preliminary objection in law in all four cases which reads as follows:

"The Respondent moves that the dispute be set aside in as much as the dispute does not constitute a labour dispute, the Disputant having already signed the option form following the salary review effective as from July 2013."

The Tribunal thus proceeded to hear arguments on the preliminary objection in law. Some evidence was adduced for the purposes of the arguments. Mr Santbaksing, Human Resource Manager, deponed on behalf of Respondent and he confirmed that the Edge Consulting Report was a report from a salary commission. The four disputants signed option forms following the Edge Consulting Report 2014. Certified copies of the relevant option forms were produced and marked Docs A to D. When questioned by counsel for disputants, Mr Santbaksing referred to paragraph 5.7 of the Report as being the relevant recommendation in relation to the present dispute. He agreed that there was no final recommendation made on 'piece rate'. He stated that a

Committee had been set up in relation to the 'piece rate' issue in line with the recommendation of the Report. There was however no final agreement on the issue of 'piece rate' and the matter was reported to the CCM.

Disputant No 3 also deponed and he produced copies of a document in relation to his transfer to the Respondent, the Edge Consulting Report (the main report) 2014 and a Supplementary Report (Docs E, F and G respectively). He agreed that he signed the option form but averred that 'piece rate' was outside the agreement and that there was to be negotiation on 'piece rate'.

Mr Bertrand, negotiator, also deponed before the Tribunal and he stated that option forms had been signed on the advice of the trade union. There was no final agreement on 'piece rate' despite the several meetings held. He agreed that the four disputants had signed option forms. However, he did not agree, given the context, that the signing of the option forms would exclude the present disputes from the definition of 'labour dispute' under the Act.

The Tribunal has examined the evidence adduced so far and the arguments offered by counsel on both sides. "Labour dispute' is defined in Section 2 of the Act as

"labour dispute" –

(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) …..;

It is not challenged that the present dispute qualifies under paragraph (a) of the above definition since each single dispute is a dispute between a worker and an employer and relates wholly or mainly to 'piece rate'. The dispute as per the terms of reference does not relate to issues of responsibility or qualification for entitlement to the piece rate but is clearly and directly in relation to an alleged increase in the rate applicable for 'piece rate', that is, the quantum to be paid for 'piece rate'.

Counsel for disputants argued that there was no agreement or revision concerning the 'piece rate' and that negotiations were still on. He then conceded that one cannot raise a 'labour dispute' in relation to matters which have already been revised but suggested

that this was not the case in relation to matters which are yet to be negotiated. However, it is not apparent at all from the terms of reference that the dispute is in fact on piece rate which is allegedly yet to be negotiated between the parties. The terms of reference simply provide as follows:

"Whether the piece rate should be increased by 27% as recommended by Edge Consulting Report 2014 effective as from 1st of July 2013 instead of 15% as wrongly adjusted by the Mauritius Cane Industry Authority (Sugar Storage Handling Unit, ex. Bagged Sugar Storage and Distribution Co. Ltd." [underlining is ours]

The Tribunal will have jurisdiction to hear a dispute if the Tribunal is in presence of a 'labour dispute' as defined in the Act. We will refer to the 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 existence of an 'industrial dispute' (as it was under the now repealed Industrial Relations Act (IRA)) for the Tribunal to inquire in a 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*."

The proviso under limb (b) of the definition of 'labour dispute' under section 2 of the Act has been laid down in fairly wide terms. Under the repealed IRA, the term used was

'industrial dispute' and its definition was somewhat different from the definition of 'labour dispute'. 'Industrlal dispute' was defined as follows (subsequent to the amendment brought by Act No 13 of 2003):

"industrial dispute" means 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 –

(a) a contract of employment or a procedure agreement except, notwithstanding any other enactment, those provisions of the contract or 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.

(b) the engagement or non-engagement, or termination or suspension of employment, of an employee; or

(c) the allocation of work between employees or groups of employees;

The Permanent Arbitration Tribunal in a ruling delivered in the case of **Telecommunications Workers Union And Mauritius Telecom, RN 754** stated the following:

"*We find therefore that in the light of such recent amendment brought to the Industrial Relations Act in respect of PRB [Pay Research Bureau] Awards, it is already against Government policy to have matters which have been considered and not agreed upon in the course of negotiations be reconsidered by way of industrial dispute immediately after an agreement has been reached between the employers and employees arising out of the same negotiations*."

This was reiterated in the case of **University of Mauritius Academic Staff Association And University of Mauritius, RN 890**.

The exclusion in part (b) of the definition of 'labour dispute' under the Act is not that different (though it would appear to be drafted in wider terms) from the exclusion which existed in the definition of 'industrial dispute' (except that the exclusion has now been extended to recommendations made in a report of a salary commission by whatever name called). The Supreme Court in the case of **Federation of Civil Service and Other Unions and others v. The State of Mauritius and Anor, 2009 SCJ 214** had to deal with an action for constitutional redress following the amendment of the definition of 'industrial dispute' under the IRA to exclude disputes which relate to those provisions

of the contract or 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 Supreme Court stated the following:

"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.

....

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 case of **T.S.M. Cunden & 5 others And Technical School Management Trust Fund, RN 1028**, the Permanent Arbitration Tribunal 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*."

The Tribunal has however on a few occasions entertained cases where the dispute is not directly in relation to remuneration or allowances of any kind but more in relation to issues of qualification or responsibility which would incidentally have a bearing on remuneration or allowances **(vide Government General Services Union (GGSU) And Government of Mauritius, RN 975)**.

In the present case, there is unchallenged evidence before us that the Edge Consulting Report 2014 was a report of a salary commission. A copy of the Edge Consulting

Report 2014 consisting of a main report and a supplementary report has been produced before us. The report dealt with the issue of piece rate both in the main report and in the supplementary report. The dispute before us very importantly arises directly from and because of the exercise by the disputants of the option to be governed by the recommendations made in the Edge Consulting Report 2014. If they had not exercised the relevant options there would have been no dispute before us as to "[w]hether the piece rate should be increased by 27% as recommended by Edge Consulting Report 2014 as from 1st of July 2014 …." The dispute arises clearly as a result of the exercise by the disputants of an option to be governed by the recommendations made in a report of a salary commission. The dispute is in relation to remuneration or allowances of any kind.

The Tribunal thus finds that the dispute, ex facie the terms of reference, pleadings and evidence adduced so far, is not a labour dispute. Though the mechanism involved where a worker signs an option form to be governed by the recommendations made in a report of a salary commission is different from that where a collective agreement is signed between a recognised trade union and an employer, yet it is apposite to note section 67 (as amended by Act No. 5 of 2013) of the Act which provides as follows:

"67. Limitation on report of labour disputes

Where a labour dispute is reported to the President of the Commission under section 64, no party to the dispute may report –

(a) …
(b) …

(c) while a collective agreement is in force, a labour dispute on matters relating to wages, and terms and conditions of employment which —

(i) are contained in the collective agreement;

(ii) have been canvassed but not agreed upon during the negotiation process leading to the collective agreement; or

(iii) have not been canvassed during the negotiation process leading to the collective agreement, except during a period of negotiation for renewal of the collective agreement starting from a date specified in section 55(3A)."

The Tribunal rejects the submission that the exercise of an option will lead to the exclusion of disputes only in relation to specific matters which have been revised. The exclusion under part (b) of the definition of 'labour dispute' has been drafted in wide terms. The Tribunal believes that the exclusion will apply to what is in the report of the salary commission but also in relation to what is not in the report provided the dispute is

made as a result of the exercise of the option and is in relation to remuneration or allowances of any kind (**vide case of Mr Seetuldeo Balgobin And The State of Mauritius rep. by The Ministry of Labour, Industrial Relations, Employment and Training, ERT/RN 01/16**).

Evidence has been adduced of meetings held to discuss the issue of 'piece rate' after the signing of the option forms. Mr Bertrand added that the HR Manager had suggested that an independent body be set up to look into the request. More importantly, it is provided, for example, at page 7 of the Edge Consulting Report (main report) 2014 (Doc F) that the detailed terms of reference for the assignment included: "*to assist in the interpretation of the recommendations*".

For the reasons given above, the Tribunal finds that the dispute as laid down in the terms of reference does not constitute a labour dispute. The Tribunal has no jurisdiction to entertain the present matter and the case is set aside.

SD Indiren Sivaramen

Vice-President

SD Francis Supparayen

Member

SD Abdool Feroze Acharauz

Member

SD Ghianeswar Gokhool

Member **24 July 2017**