EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 92/2017

RULING

Before: -

Shameer Janhangeer	**Vice-President**
Vijay Kumar Mohit	**Member**
Abdool Feroze Acharauz	**Member**
Yves Christian Fanchette	**Member**

In the matter of: -

Mr Yousouf Ibne Abdulla Cheddy

Disputant

and

The State of Mauritius
as represented by
The Ministry of Labour, Industrial Relations, Employment and Training

Respondent

In presence of: -

The Ministry of Civil Service and Administrative Reforms

Co-Respondent No.1

and

The Pay Research Bureau

Co-Respondent No.2

The present matter has been referred to the Tribunal by the Commission for Conciliation and Mediation (the "Commission") pursuant to *section 69 (7)* of the *Employment Relations Act 2008* (the "*Act*"). The Terms of Reference of the dispute read as follows:

1. *Whether the draft Schemes of Service prepared by the Ministry of Labour, Industrial Relations, Employment and Training for the Post of Deputy Director, Occupational Safety and Health should be in line with decisions reached with the Permanent Secretary of the Ministry of Labour, Industrial Relations, Employment and Training during a meeting held on 3 November 2016 so as to have one post of Deputy Director, Occupational Safety and Health (Specialist Support Services) and one post of Deputy Director, Occupational Safety and Health (Occupational Safety and Health Inspectorate); and*

2. *Whether the Schemes of Service for the post of Deputy Director, Occupational Safety and Health should be in line with paragraphs 38.24 to 38.35 of the Chapter 38 of the Pay Research Bureau Report 2016 Part I – Civil Service (REVIEW OF PAY AND GRADING STRUCTURES AND CONDITIONS OF SERVICE IN THE PUBLIC SECTOR).*

The Respondent, in its Statement of Reply to the Disputant's Statement of Case, has raised a Preliminary Objection to the dispute. This reads as follows:

> *Respondent moves that the dispute be set aside in as much as there is no live issue left in the present case as the scheme of service for the post of Deputy Director, Occupational Safety & Health has already been prescribed and the effective date is as from 01 August 2017.*

The parties were each assisted by Counsel. The matter came for arguments on the Preliminary Objection raised by the Respondent.

Counsel for the Respondent has, in relation to the Preliminary Objection raised, submitted that a copy of the prescribed scheme of service has been annexed to the Respondent's Statement of Reply from which it can be seen that its effective date is 1 August 2017. She referred to the two-fold Terms of Reference of the dispute which firstly, refers to whether the draft scheme of service should be in line with certain discussions and decisions taken during a meeting held on 3 November 2016 with the Permanent Secretary of the Ministry of Labour, Industrial Relations, Employment and Training and secondly, whether the scheme of service should be in line with the Pay Research Bureau ("PRB") recommendations as specified.

Counsel for the Respondent has gone on to submit that the scheme of service is no longer at a draft stage and has already been finalized and prescribed. What is it that the Disputant can ask in law from this Tribunal? There is no *raison d'être* for the Disputant to ask for these specific prayers as they no longer hold relevant. The Tribunal is limited to what has been referred to it by the Terms of Reference and cannot step outside these parameters and look as to whether it can amend the prescribed scheme of service. The Tribunal can only observe that it has been superseded by events and can no longer interfere in the matter. There is no longer any live issue left. There are other alternatives open to the Disputant to challenge the scheme of service prescribed. The dispute should purely and simply be set aside as it has no relevance anymore.

Counsel for the Respondent also added that the Disputant would be embarking the Tribunal on a fruitless and useless exercise and reiterated the well-known principle that Courts of Law or Tribunals established by law should not embark on exercise which is merely academic, declaratory or would serve no useful purpose.

Counsel for the Disputant has admitted, in his reply to the arguments on the Preliminary Objection, that the final scheme of service has been prescribed, that it has been prescribed after the dispute was reported by the Disputant and after the referral of the dispute by the Commission to the Tribunal. Counsel submitted that it is for the Tribunal, in light of the Terms of Reference, to determine the issue. What has happened should be of no concern to the Tribunal as this is outside the parameters of the Terms of Reference. The Tribunal should situate itself at the point in time when the dispute was referred and is bound to limit itself to the Terms of Reference.

Counsel for the Disputant has also referred to *section 97* of the *Act* and the '*the principles and practices of good employment relations*' by which it is understood that the Tribunal should see what is the practice of good employment relations. He submitted that the Respondent has proceeded in a manner which is not conducive to good employment relations. In view of *section 97* and the promotion of good industrial relations, the Tribunal has the power, given the new circumstances, to give the Disputant an opportunity to amend his Terms of Reference before the Commission.

Counsel for Co-Respondent Nos. 1 & 2 have joined in with the submission made by Counsel for the Respondent. It must be noted that Counsel for Co-Respondent No.2 has stated that it is abiding by the decision of the Tribunal.

The present matter has been referred to the Tribunal by the Commission in accordance with *section 69 (7)* of the *Act*. Upon the matter being referred, the Tribunal has to enquire into the dispute and make an award thereon in accordance with *section 70 (1)* of the *Act*.

The following may be noted from what was stated by the Supreme Court in *Air Mauritius v Employment Relations Tribunal* [*2016 SCJ 103*] in relation to the duty of the Tribunal upon a referral:

> *Under section 70 (1) the Tribunal is required to enquire into the substance of the dispute that is referred to it and to make an award thereon and it is not empowered to enquire into any new matter that is not within the terms of reference of the dispute.*

In the present matter, the Respondent has raised a Preliminary Objection to the effect that there is no live issue in the present case as the scheme of service for the post of Deputy Director, Occupational Safety and Health has already been prescribed, the effective date being 1 August 2017. It has been submitted on behalf of the Respondent, in view of the Terms of Reference, that the Tribunal would be embarking on a fruitless and useless exercise. The Disputant has, on the other hand, admitted that the final scheme of service has been prescribed after the dispute was reported and after the referral of the matter to the Tribunal.

It would be pertinent to note that the Tribunal has in the past cautioned against the making of declaratory awards in relation to disputes referred to it. The following may be noted by what was stated by the Tribunal in *Cheddy and Ministry of Labour, Industrial Relations, Employment and Training* (*ERT/RN 120/15*) in relation to declaratory awards:

> *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, in *Mooneeapen and Mauritius Institute of Training and Development* (*ERT/RN 35/12*), it may be noted that the Tribunal stated the following:

> *The Tribunal is being merely asked to give a declaratory award on whether the Respondent should have proceeded with the interview or not. We quote here what was held in* ***Planche v. The PSC & Anor [SCJ 128 of 1993]: -***
>
> *"It seems to us that this application is incompetent if only for the reason that the question in issue is now purely an academic one. We can do no better than echo the dictum of Lord Justice Clerk Thomson in McNaughton v McNaughton's Trs, (1953) SC 387, 392: -*
>
> > *"Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau."*

In the present matter, as per the Terms of Reference of the dispute, the Disputant is asking that the draft schemes of service prepared by the Ministry of Labour, Industrial Relations, Employment and Training for the post of Deputy Director, Occupational Safety and Health should be in line with decisions reached with the Permanent Secretary of the aforesaid Ministry during a meeting held on 3 November 2016; and secondly, whether the schemes of service for the post of Deputy Director, Occupational Safety and Health should be in line with paragraphs 38.24 to 38.35 of the PRB Report of 2016 Part I Civil Service.

It has not been disputed that the scheme of service in question is no longer at a draft stage. As per the Statement of Reply of Co-Respondent No.1, the scheme of service was submitted to it on 30 March 2017 and has been prescribed on 1 August 2017. The present dispute was reported to the Commission on 29 May 2017 and referred to the Tribunal on 17 July 2017. It is therefore clear to see that the process of having the scheme of service for the post of Deputy Director, Occupational Safety and Health finalized and prescribed was already set off prior to the Disputant reporting the present dispute on 29 May 2017.

Although the second aspect of the Terms of Reference of the dispute do not expressly refer to the word 'draft' in relation to the scheme of service for the post of Deputy Director,

Occupational Safety and Health, it may be noted from the report of a dispute form submitted to the Commission as annexed to the Disputant's Statement of Case (Annex V(a)) that the Disputant has referred to the draft scheme of service of the aforesaid post as not being in line with paragraphs 38.24 to 38.35 at paragraph 5 of the report form. This may be noted from the report form as follows:

> *(1) The Draft Scheme of Service of the Deputy Director, Occupational Safety and Health of the Ministry of Labour, Industrial Relations Employment and Training has been prepared by the Ministry and it is not in line with the decisions reached with the Permanent Secretary of the Ministry of Labour, Industrial Relations, Employment and Training during a meeting held on 3 November 2016 so as to have one post of Deputy Director, Occupational Safety and Health (Specialist Support Services) and one post of Deputy Director, Occupational Safety and Health (Occupational Safety and Health Inspectorate) and with paragraphs 38.24 to 38.35 of the Chapter 38 of the Pay Research Bureau Report 2016 Part 1 – Civil Service (REVIEW OF PAY AND GRADING STRUCTURES AND CONDITIONS OF SERVICE IN THE PUBLIC SECTOR).*

Therefore, at the time of the reporting of the dispute and the referral of the matter to the Tribunal, the scheme of service in question was still at a draft stage and not finalized. However, the scheme of service has been prescribed on 1 August 2017 and as at now, the Terms of Reference of the dispute does not reflect the current state of affairs regarding the scheme of service of the aforesaid post. It would therefore amount to an academic and hypothetical exercise for the Tribunal to enquire and deliver an award in relation to the present Terms of Reference inasmuch as the scheme of service for the post of Deputy Director, Occupational Safety and Health has already been finalized and prescribed since the 1 August 2017 and is no longer at a draft stage as is reflected in the Terms of Reference.

The Disputant is contending that the Tribunal should adhere to the Terms of Reference of the dispute and not heed the events that have happened since the dispute was referred. There is no doubt that the Tribunal is bound by the Terms of Reference of the dispute (vide *S. Baccus & Ors v The Permanent Arbitration Tribunal* [*1986 MR 272*]). However, in light of the Preliminary Objection which has been raised, it is difficult for the Tribunal to ignore the current state of affairs regarding the scheme of service for the post Deputy Director, Occupational Safety and Health given that it is the subject matter of the dispute referred to the Tribunal. Furthermore, in ignoring the events since the reporting of the dispute, the Tribunal would be embarking itself on an academic and hypothetical exercise.

The Disputant is also asking the Tribunal to give him an opportunity to amend the Terms of Reference of the dispute before the Commission. This demonstrates that the Disputant is aware that the Terms of Reference does not tally with the actual reality of the dispute. It must be noted that under the *Act*, it is the Commission which refers labour disputes to the Tribunal with the consent of the worker. Although, *paragraph 6 (1)* of the *Second Schedule* of the *Act* allows the Tribunal to exercise its jurisdiction in such manner so as to enable the parties to avail themselves of the conciliation and mediation services of the Commission, it must be noted that the Disputant in this instance is asking for the Terms of Reference to be amended by the Commission.

Although, the Disputant is also asserting that the Respondent has acted in a manner which is not conducive to good industrial relations in prescribing the scheme of service for the post of Deputy Director, Occupational Safety and Health and has acted contrary to *section 97* of the *Act*, it must be noted that, as rightly pointed out by the Respondent, the Disputant does have other remedies against the finalization and prescription of the aforesaid scheme of service and to challenge same. It must also be borne in mind that *section 97* refers to principles that may be applied by the Tribunal in the exercise of its functions in relation to a matter before it.

It may be noted that the case of *Planche v The PSC & Anor* [*supra*], which was cited by the Tribunal in its award in *Mooneeapen and Mauritius Institute of Training and Development* (*supra*), refers to courts rather than Tribunals. Can the Tribunal therefore be equated to a Court of law? On this issue, the following may be noted from *Elliot and Phipson Manual of the Law of Evidence by D. W. Elliot* (at page 319) as cited by the Supreme Court in *Sooknah v The CWA* [*1998 SCJ 115*]:

> *"A court includes not only the regular superior courts of judicature but also inferior courts and tribunals, even domestic tribunal, provided they have jurisdiction either by the law or by the parties consenting to submit their affairs to adjudication by such tribunals. Thus the principle of conclusiveness has been held to be applicable to decisions of courts-martial, arbitrators and domestic tribunals such as the General Medical Council. In the present context, the awards of any such tribunal, however lowly, "are as conclusive and unimpeachable (unless and until set aside on any of the recognised grounds) as the decisions of any of the constituted courts of the realm.""*

In the circumstances, given that the Tribunal would be embarking itself on an academic and hypothetical exercise in proceeding to hear the dispute as per the current Terms of Reference, the Tribunal finds that the Preliminary Objection raised by the Respondent to be well taken and therefore upholds same.

The dispute is therefore set aside.

Sd Shameer Janhangeer
(Vice-President)

Sd Vijay Kumar Mohit
(Member)

Sd Abdool Feroze Acharauz
(Member)

Sd Yves Christian Fanchette
(Member)

Date: 31st October 2017