EMPLOYMENT RELATIONS TRIBUNAL

ORDER

ERT/RN 11/18

Before	**Indiren Sivaramen**	**Vice-President**
	Marie Désirée Lily Lactive	**Member**
	Karen K. Veerapen	**Member**
	Kevin C. Lukeeram	**Member**

In the matter of:-

Mr Sydney Wong Tong Chung (Appellant)

And

Commission for Conciliation and Mediation (Respondent)

The Appellant has by way of a letter dated 22 January 2018 (received on 23 January 2018) appealed against the rejection of a dispute by the Commission for Conciliation and Mediation (the "CCM"). The Appellant has not filed grounds of appeal as such but has filed a Statement of Case.

The Respondent has filed a Statement of Reply and is maintaining the decision to reject the points in dispute as per section 65(1)(f) of the Act.

Both parties were assisted by counsel and the Tribunal proceeded to hear the appeal.

The disputes before the CCM were as follows:

1. *"Whether my pension under the Rogers Money Purchase Retirement Fund should be readjusted to take into account my date of entry which is June 1976 instead of 1996."*
2. *"Whether I am entitled to a retirement gratuity as per provision of the law."*

The appeal is only in relation to dispute under limb 1 and it is conceded that the dispute under limb 2 in relation to gratuity falls within the exclusive jurisdiction of the Industrial Court.

The Tribunal will have to address a few issues which are called for in the present matter:

1. The Tribunal has on a number of occasions stated that an appeal under section 66 of the Act must be directed against the President of the CCM and not the CCM. The power to reject a report of a dispute is given to the President of the CCM under section 65 of the Act when the latter is of the opinion that, for example, the dispute relates to any issue within the exclusive jurisdiction of the Industrial Court (Section 65(1)(f) of the Act).

   Section 65(1)(f) of the Act thus provides as follows:

   65. Rejection of labour disputes

   (1) "The President of the Commission may reject a report of a labour dispute made under section 64 where he is of the opinion that-

   (a) ....

   (f) the dispute relates to any issue within the exclusive jurisdiction of the Industrial Court.

   This is unfortunately not a mere "typing mistake" as Counsel for Appellant has put it and in effect amounts to the appeal having been made against the wrong party. Any order of the Tribunal would be made against the wrong person.

2. As per the record, Counsel for Appellant confirmed that the Statement of Case filed in the present case constituted in fact the grounds of appeal of the Appellant. The Statement of Case of Appellant reads as follows:

Appeal against the decision of the CCM as per CCM letter dated 5 January 2018 (Annex 1).

1. The dispute was declared in conformity with section 64 of the Employment Relations Act on 26 December 2017 (Annex 2).

2. On basis of the CCM Report, the matter was reported to the Labour Office of Port Louis.

3. The Labour Office informed Mr Jean Sydney Wong Tong Chung:

*3.1 That **ONLY** dispute No.2 will be inquired into and in case the employer has not respected the retirement gratuity provisions of the law (The Employment Rights Act), the matter will be referred to the Industrial Court.*

*3.2 That regarding Dispute 1 **"Whether the pension of Mr Wong, under the Rogers Money Purchase Retirement Fund, should be readjusted to take into account his the date of entry as June 1976 instead of 1996"** the matter is **NOT "within the exclusive jurisdiction of the Industrial***

Court" *as stated by the Commission. That in fact it* ***CANNOT*** *be dealt with by the Industrial Court.*

4. *Hence the application of Mr. Wong.*

5. *Mr. Wong contends that as per section 69(7) of the Employment Relations Act the dispute should have been referred to the Tribunal.*

6. ***Question****: In case this matter* ***CANNOT*** *be referred to the Industrial Court, is it a matter that can be referred to a Civil Court? Surely, in the form of a claim for compensation. However, Mr. Wong can opt as per the Employment Relations Act to refer the matter to the Tribunal. The consent of the worker has been given or can be given.*

The Tribunal finds that the Statement of Case will be more appropriate for the arbitration of a labour dispute and not for an appeal. The Tribunal has difficulty in ascertaining the grounds on which the Appellant is in fact challenging the decision in the present matter. Reference has been made to what the 'Labour Office' allegedly told Appellant and this would be the basis for the appeal before us. The Statement of Case then ends with a question. The only clear averment made by Appellant himself is that the dispute should have been referred to the Tribunal. Even if this is accepted as a ground of appeal, the Tribunal cannot eventually allow the appeal on such a 'ground' as the appeal is concerned with the rejection of a report of a dispute and the Tribunal cannot preempt that the dispute has to be referred to the Tribunal when it was not even considered by the CCM.

Though the Tribunal no doubt operates with a minimum of legal formalities and tries to be as practical as possible, the Tribunal is faced with a major obstacle in the present matter in relation to the 'grounds of appeal'.

3. The Tribunal is of the view that an appeal under section 66 of the Act (though the section itself is nowhere mentioned by Appellant in his 'appeal') must also be directed against the employer as Co-Respondent or at least be made in the presence of the employer. The Tribunal will refer to sections 64(7) and 65(3) of the Act which read as follows:

64(7) Where a labour dispute is reported to the Commission, a copy of the report of the dispute shall be served by or on behalf of the party making the report upon every other party to the dispute.

65(3) The President of the Commission shall give written notice of any rejection within 14 days of receipt of the report of the dispute to all the parties to the dispute.

The Tribunal will also quote the following from a judgment of the Supreme Court in the case of **Pharmaceutical Import& Export Ltd & anor v Bahemia F.H. & Ors 2012 SCJ 379**:

"*Mr. Jaddoo, Counsel for the respondents, on the strength of the authorities of **Comty v Loizeau [1884 MR 132]**, **Lam Shang Leen v Sauzier [1958 MR 237]**, **Chamroo v La Preservatrice Co. Ltd**. **[1990 MR 302]**, and an unreported decision of the Court of Civil Appeal, dated 17 October 2011, in the case of **Raman v Macky & Ors** bearing reference **SCR No. 932 (6B/43/08)**, has moved that the present appeal be dismissed on the ground that failure to join a party to an appeal is fatal to the appeal proceedings.*

Mr. Pursem, for the appellants whilst fairly conceding that in principle all interested parties must be joined as parties to an appeal, nevertheless submitted that the decisions cited by Mr. Jaddoo do not lay down any hard and fast rule as regards the joining of parties.

…

*In **Comty (supra)**, the Appellate Court answered the question whether an execution debtor who was made ex-officio a party to the interpleader proceedings in the Court below and was heard as a witness, ought to have on appeal been made a party, in the following terms*:

"…*can we deal with a judgment in which he (the execution debtor) is concerned when he has had no notice of the appeal and was not summoned to appear as a co-respondent. We think that he ought to have been made a respondent, and that in his absence we cannot deal with this appeal*."

…

*In **Raman (supra)**, Counsel for the appellant conceded that no notice of appeal had been served on the Registrar of Civil Status who was not a party in the appeal proceedings but who was a co-respondent in the case between the appellants and the respondents. She however urged the Court of Appeal to allow the appeal to proceed for three reasons:*

1. The appeal was against a dismissal of the case on a plea in limine litis. Should the appellants be successful on appeal, the case will be referred back to the trial Court for a proper determination and the Registrar will be a party.

2. The Registrar was made a party to the case to amend the register of the Civil Status in the event the appellant (then plaintiffs) were successful. His stand was merely that he was abiding by the decision of the Court.

3. The other parties to the appeal proceedings had no objection to the appeal being proceeded in the absence of the Registrar.

The Court of Civil Appeal declined to follow the suggestions of Counsel for the appellant taking the view that the law makes no distinction between a respondent and a co-respondent. The Court found that as one of the parties was not a party in the appeal case, the appeal could not be proceeded with. The appeal was accordingly dismissed.

Our understanding and interpretation of the ratio decidendi of the aforementioned

cases are that parties before the lower Court must be joined in the Appeal proceedings."

In the case of **Baines J v Pothunah P & Ors 2016 SCJ 9**, the Supreme Court made a distinction between the non-joinder of parties in relation to a plaint with summons (which was the case there) as compared to 'principles governing appeals and applications for judicial review'.

The Supreme Court thus stated the following:

"*In my view, principles governing appeals and applications for judicial review are of little avail when considering non-joinder in relation to a plaint with summons, in the light of the clear and express provisions of rule 19 (1) of the SCR 2000."*

The Tribunal is thus of the view that the appeal should have been made at least in the presence of the employer. The Tribunal will leave open the question whether the "Rogers Money Purchase Retirement Fund" should also have been joined in as a party before the CCM.

Despite these issues, the Tribunal wishes to observe, very importantly, that The Private Pension Schemes Act 2012 (which appears, on the basis of material available before us, to be the relevant piece of legislation in the present matter and which deals with matters pertaining to private pension schemes including, for example, the transfer of a member from one pension scheme to another) provides at section 54(2) the following:

54 (2) Notwithstanding any other enactment, any civil or criminal proceedings instituted under this Act shall, in the Island of Mauritius, be entered before the District Court of Port Louis.

The term "date of entry" has been used in a very vague manner in the terms of reference and the Tribunal will not linger over whether it relates to the date Appellant joined his last employer, the Fund or simply to "continuous employment" which is specifically provided for under the Employment Rights Act (section 9).

For the reasons given above, the Tribunal finds that the present appeal cannot be entertained by the Tribunal and the decision of the President of the CCM is thus confirmed. The appeal is set aside.

SD Indiren Sivaramen

Vice-President

SD Marie Désirée Lily Lactive

Member

SD Karen K. Veerapen

Member

SD Kevin C. Lukeeram

Member

27 March 2018