

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 37/2017

RULING

Before:

Shameer Janhangeer	Vice-President
Vijay Kumar Mohit	Member
Karen K. Veerapen (Mrs)	Member
Arassen Kallee	Member

In the matter of: -

Ms Mansa Daby

Disputant

and

Open University of Mauritius

Respondent

Ipo:

Ministry of Education and Human Resources, Tertiary Education and Scientific Research

Co-Respondent

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

Whether I should be have been confirmed in my position of Assistant Lecturer/Lecturer held at the Open University of Mauritius, with effect from 01 August 2015.

All the parties were assisted by Counsel in the present matter. The Disputant was assisted Mr D. Ramano, of Counsel. Whereas the Respondent was assisted by Miss B. H. Maherally, State Counsel, instructed by the Deputy Chief State Attorney and the Co-Respondent was assisted by Miss D.P. Punchu, State Counsel, instructed by the Principal State Attorney.

The hearing of the matter had commenced with the deposition of the Disputant. However, the Respondent has now raised a preliminary objection in law to the hearing of the present dispute. Counsel for the Disputant did not object to the Respondent raising the preliminary objection and the matter was accordingly put for arguments.

The preliminary objection in law raised by the Respondent reads as follows:

The Respondent moves that the present dispute be set aside inasmuch as the granting of an award in terms of the Terms of Reference of the labour dispute before the Tribunal will be inconsistent with sections 5 and 10 of the Open University of Mauritius Act and thus, be contrary to section 72 (5) of the Employment Relations Act.

Counsel for the Respondent has notably referred to *section 5* of the *Open University of Mauritius Act* in her submissions. This deals with the functions of the Open University and is in mandatory terms. She specifically referred to *sub-paragraph (p)*, whereby the Open University has the exclusive function of laying down the conditions of service of staff, which are their terms of employment. Referring to *section 10* of the *Open University of Mauritius Act*, it was submitted that the Board appoints the academic staff under *section 10 (2)(a)(ii)* of the aforesaid Act. Reference was then made to *section 72 (5)* of the Act.

Counsel for the Respondent thereafter referred to a letter dated 11 July 2014 from the Respondent addressed to the Disputant whereby the terms and conditions have been laid out. The terms and conditions have been decided by the Open University and this function as per the law rests solely with the Respondent. The Disputant is asking the Tribunal to decide on the terms and conditions laid down by the Respondent in asking the Tribunal to determine whether she ought to have been confirmed with effect from August 2015. As the Tribunal operates under the Act, there is an impediment as to its jurisdiction in this matter as its award will rule on the Disputant's probationary period, which is not for the Tribunal to decide. Having regard

to *section 72 (5)* of the *Act*, the award of the Tribunal will be inconsistent with *section 5* of the *Open University of Mauritius Act*. Furthermore, under *section 10* of the aforesaid *Act*, an appointment rests with the Board of the Respondent and it is not for the Tribunal to decide whether or not to confirm the Disputant in the circumstances.

Counsel for the Disputant has, on the other hand, submitted that pursuant to *section 70 (1)* of the *Act*, it is mandatory for the Tribunal to enquire into the dispute. It is not contested that the Open University can lay codes of conduct and conditions of service, referring to *section 5 (p)* of the *Open University of Mauritius Act*. The Tribunal, however, has to see if the conditions of service have been respected. The one-year probationary period of the contract is not being contested. It is for the Tribunal to see if justice has been done in the interpretation of these terms and conditions. *Section 5* of the aforementioned *Act* only sets out the functions of the institution, in order to enable it to fulfil its mission. The Open University is responsible for the organisation of work; it may set the terms and conditions of service, but when there is a breach, it is not for them to decide upon the breach. A victim must have a forum to turn to when the exercise of appointing or of confirming is flawed. Counsel submitted that the Disputant can seek a remedy from this Tribunal.

Counsel for the Disputant further submitted that nowhere in the *Open University of Mauritius Act* it explicitly stated that the *Act* has no jurisdiction in the matter. The former *Act* has not precluded the jurisdiction of the Tribunal. Reference was also made to *section 5 (b), (d)* and *(h)* of the *Open University of Mauritius Act* and to the power of the Tertiary Education Commission over the Respondent in relation to these sub-paragraphs. It was submitted that the Tribunal has jurisdiction to oversee whether what is set in *sections 5* and *10* of the aforesaid *Act* are along the lines of natural justice.

It should also be noted that State Counsel for the Co-Respondent stated that the latter is abiding by the decision of the Tribunal and thereby choose not to offer any submissions in relation to the preliminary objection in law.

The basis of the present preliminary objection in law is *section 72 (5)* of the *Act*. In the context of the objection raised, it would be useful to produce the wordings of this provision. This notably provides:

72. Award and its effects

...

(5) *An award under sections 56(5) and 70(1) shall not contain any provision inconsistent with any enactment, other than a Remuneration Regulations, relating to the terms or conditions of, or affecting, employment, and any such provision shall, to the extent of the inconsistency, be void.*

In the present matter, it has not been disputed that any eventual award of the Tribunal in relation to the present labour dispute would be under *section 70 (1)* of the Act. *Section 72 (5)* of the Act clearly states that the award of the Tribunal shall not contain any provision inconsistent with any enactment relating to the terms or conditions of, or affecting, employment. It also specifies that any such provision in the award shall be void to the extent of the inconsistency. It may be noted that an exception has been provided for in respect of Remuneration Regulations.

The preliminary objection in law has also cited *sections 5 and 10* of the *Open University of Mauritius Act*. The relevant provisions of these two sections read as follows:

5. Functions of Open University

The Open University shall have such functions as are necessary to attain its objects most effectively and shall, in particular—

...

(p) *provide, control and maintain discipline among the learners and academic and general staff and lay down the conditions of service of such staff, including their codes of conduct;*

10. Functions and powers of Board

(1) *The Board shall be the governing body having the direction and superintendence of the Open University and its principal functions shall include—*

(a) *devising or approving strategic plans and policies for the Open University;*

(b) *overseeing its management and development;*

(c) *monitoring and reviewing its operations; and*

(d) *providing rigorous accountability standards in its various operations.*

- (2) *The Board may—*
- (a) *on behalf of the Open University—*
 - ...
 - (ii) *appoint the academic and general staff;*
 - ...
 - (b) *do all such things as may be necessary for, or incidental or conducive to, the performance of its functions under subsection (1).*

Section 5 of the Open University of Mauritius Act refers to the functions of the Open University. It is clearly stated, in the mandatory sense, that the Open University shall lay down the conditions of service of academic staff. Furthermore, *section 10 of the aforesaid Act, at subsection (2), inter alia* provides that the Respondent's governing body, which is the Board, may appoint the academic staff. It must be noted that Counsel for the Disputant has not disputed the powers of the Open University under the aforementioned provisions of its *Act*.

Counsel for the Disputant has, in fact, submitted that once a labour dispute has been duly referred to the Tribunal, the latter is bound to enquire into the matter in accordance with *section 70 (1) of the Act*. It cannot be disputed that the Tribunal bound to enquire into a labour dispute referred to it under *section 69 (7) of the Act*. However, the Tribunal is always entitled to determine whether it has the necessary jurisdiction to arbitrate on a dispute referred before it.

The Tribunal, in view of these particular contentions, would refer to a ruling of the then Permanent Arbitration Tribunal in *Mrs C. M. Tatiah and Development Bank of Mauritius (RN 758)* delivered on 4 August 2004, which was followed by the Tribunal in the matter of *S. Dawon and Mauritius Institute of Training and Development (ERT/RN 163/15 to ERT/RN 170/15)*. Therein, the Permanent Arbitration Tribunal notably stated:

*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. OesterreichischerWaldbesitzerR.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 **LunadaExportadora 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.

More recently, in relation to a similar contention made before the Supreme Court in the case of *D.Ramyead-Banymandhub v The Employment Relations Tribunal [2018 SCJ 252]*, the following was stated:

The Tribunal therefore had the duty to enquire into the “substance” of the arguments put forward by the parties with regard to the objections raised by the co-respondent, and it could only adjudicate on these objections within the limits of its terms of reference.

The Tribunal ought to be satisfied of its jurisdiction to hear and enquire into a particular matter in order to enable it to duly deliver an award. The preliminary objection in law presently raised is contesting the jurisdiction of the Tribunal to give an award as per the Terms of Reference of the labour dispute as same would be contrary to *section 72 (5)* of the Act. The Tribunal cannot therefore concur with this particular argument put forward by the Disputant.

Counsel for the Disputant has also submitted that the *Open University of Mauritius Act* has not expressly excluded the Tribunal’s jurisdiction to arbitrate in the present matter. Although, this is not being disputed, it must be emphasized that the preliminary objection has been raised pursuant to *section 72 (5)* of the Act, which would render any award void for being inconsistent with *sections 5 and 10* of the *Open University of Mauritius Act* in relation to terms

or conditions of employment. It has never been contented by the Respondent that the Tribunal's jurisdiction is being excluded pursuant to the provisions of the *Open University of Mauritius Act*. The Tribunal cannot therefore concur with the Disputant on this point.

Counsel for the Disputant has also argued that the Tribunal has jurisdiction to oversee whether what is set in *sections 5 and 10* of the *Open University of Mauritius Act* are along the lines of natural justice. With regard to this argument, it should be noted that the Tribunal is bound to enquire into a labour dispute that has been referred to it pursuant to relevant provisions of the *Act*. The Tribunal, however, does not have any jurisdiction to enquire into whether any particular section of an enactment is in conformity with the rules of natural justice. That would be within the province of the Supreme Court, which has unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than a disciplinary law. Indeed, the Constitution of Mauritius confers original jurisdiction upon the Supreme Court to determine whether any provision of the Constitution has been contravened and would be the proper forum for any action praying for Constitutional redress.

Although the Tribunal has jurisdiction in matters of labour disputes as defined under *section 2* of the *Act*, which would include terms and conditions of employment, it cannot be overlooked that pursuant to *sections 5 (p)* and *10 (2)(a)(ii)* of the *Open University of Mauritius Act*, the Respondent has been conferred with the power to lay down the conditions of service of its academic staff (which would include the Disputant) and its Board has been entrusted with the power to appoint the academic staff. It may also be noted, from *section 10 (1)(b)* and *(2)(b)* of the aforesaid *Act*, that one of the principal functions of the Board is to oversee the management and development of the Open University and that it may do all such things as may be necessary for the performance of this function.

It has not been disputed that the remedy sought as per the Terms of Reference of the dispute relates to the confirmation of the Disputant in her position as Assistant Lecturer/Lecturer and that, if granted, may amount to the Disputant being confirmed in her appointment as Assistant Lecturer/Lecturer at the Open University of Mauritius. The remedy of confirming the Disputant in her position falls squarely within her terms and conditions of employment and if her confirmation is so awarded, the Tribunal would fall foul of the provisions of *section 72 (5)* of the *Act* in being inconsistent with *sections 5 (p)* and *10 (2)(a)(ii)* of the *Open University of Mauritius Act* in relation to the terms or conditions of the Disputant's employment.

Although, the Disputant is contending that the Tribunal may enquire to see if the terms and conditions of service have been respected, the Tribunal, having noted the provisions of *section 5 (p)* as well as that of *section 10 (1) and(2)* of the *Open University of Mauritius Act* and having paid heed to *section 72 (5)* of the *Act*, cannot usurp the statutory powers conferred to the Respondent in possibly awarding that the Disputant should be confirmed as Assistant Lecturer/Lecturer at the Respondent institution.

The Tribunal has also taken note of the Disputant's argument that the Open University may also be pinched by the Tertiary Education Commission in referring to *section 5 (b), (d) and (h)* of the *Open University of Mauritius Act*. Although, the Disputant is making an analogy with *section 5 (p)* of the *Open University of Mauritius Act*, the present preliminary objection in law is based on, *inter alia*, *sections 5 (p) and 10 (2)(a)(ii)* of the aforesaid *Act* and is not concerned with the other sub-paragraphs of *section 5* referred to and nor is it concerned with the supervisory functions and powers of the Tertiary Education Commission.

The Tribunal therefore finds that the preliminary objection in law raised by the Respondent must succeed.

The dispute is therefore set aside.

**(SD)Shameer Janhangeer
(Vice-President)**

**(SD)Vijay Kumar Mohit
(Member)**

**(SD)Karen K. Veerapen (Mrs)
(Member)**

**(SD)Arassen Kallee
(Member)**

Date: 20th September 2018