EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 73/2018

RULING

Before:

Shameer Janhangeer	**Vice-President**
Francis Supparayen	**Member**
Karen K. Veerapen (Mrs)	**Member**
ParmeshwarBurosee	**Member**

In the matter of: -

Miss Hansa SOOMAROO

Disputant

and

NATIONAL TRANSPORT CORPORATION

Respondent

Ipo:

1. **Ministry of Public Infrastructure and Land Transport**
2. **Ministry of Civil Service and Administrative Reforms**

Co-Respondents

The present matter has been referred to the Tribunal by the Commission for Conciliation and Mediation (the "CCM") pursuant to *section 69 (7)* of the *Employment Relations Act* (the "*Act*"). The matter was reported on 10 April 2017 to the CCM. The Terms of Reference of the dispute read as follows:

> *1. Whether I should have been granted one increment for my higher relevant qualification acquired prior to my recruitment at the National Transport Corporation, which is higher than that prescribed in the scheme of service for the post of Senior Human Resource Officer.*

2. Whether I should be paid a Responsibility Allowance for having performed additional higher duties and responsibilities of the Industrial Relations Officer.

The Respondent has, in its Statement of Case, raised a plea *in liminelitis* to the hearing of the present dispute. This reads as follows:

The Respondent states that:

(a) the dispute is barred in as much as it has been reported more than 3 years after the act or omission which gave rise to the dispute;

(b) this Tribunal has no jurisdiction to deal with the present matter because it does not constitute a labour dispute as defined by section 2 of the Employment Relations Act (as amended), in particular paragraph (b) of the said definition, since the Disputant has exercised an option to be governed by the recommendation of the Pay Research Bureau Reports 2008 and 2013.

Both parties were assisted by Counsel. Mr S. Soyjaudah, of Counsel, appeared for the Disputant. Whereas, Mr G. Ithier SC appeared for the Respondent. The Co-Respondents had moved to be dispensed for the purpose of the present arguments. The matter was therefore argued on the plea *in liminelitis* raised by the Respondent.

Learned Senior Counsel for the Respondent, at the outset of his arguments, produced a copy of the report of the dispute form before the CCM dated 7 April 2017 (Document A); an Option Form dated 13 June 2008 signed by the Disputant (Document B); an Option Form dated 5 November 2012 signed by the Disputant (Document C); and the Disputant's letter of appointment dated 24 March 2008 (Document D).

Learned Senior Counsel for the Respondent proceeded to submit that the dispute is time barred as it has been reported more than three years after the act or omission which gave rise to the dispute as per *paragraph (c)* of the definition of a labour dispute in the *Act*. Regarding the first dispute, the Disputant was already a graduate and a postgraduate at the time of her appointment with the Respondent on 2 April 2008. This is when the omission took place as she is asking to be granted one increment for her higher relevant qualification acquired

prior to her recruitment with the Respondent as per the Terms of Reference. As from this date, the Disputant had three years to enter proceedings and did not do so. The matter was only reported to the CCM in April 2017.

On the second point, Learned Senior Counsel referred to *paragraph (b)* of the definition of a labour dispute under the *Act*. Reliance was placed on a ruling of the Tribunal in *Roopsing and The State of Mauritius* (*ERT/RN 143/2017*). He submitted that an increment is part of the salary and falls within the ambit of the word '*remuneration*'. As the Disputant has signed the Option Form in 2008 and 2012, the dispute is therefore not a labour dispute.

In relation to the second aspect of the Terms of Reference, Learned Senior Counsel submitted that the omission took place in December 2009, referring to paragraph 11 of the Disputant's Statement of Case. This is when she assumed higher duties of Industrial Relations Officer and is why she is claiming a responsibility allowance. More than three years have elapsed since 2009 and the dispute is time barred. Moreover, by signing the Option Forms, she has agreed that the emoluments she is receiving are final and the Responsibility Allowance claimed is within the parameters of *paragraph (b)* of the definition of a labour dispute under the *Act*.

Learned Counsel for the Disputant called the Disputant to adduce evidence for the purposes of the plea *in liminelitis*. Miss HansaSoomaroonotably stated that she first made a verbal request for the payment of an increment to the Acting Human Resource Manager Mr Mallam Hassam in 2009. She made the request in writing on 29 September 2014. Regarding the higher responsibility allowance, she asked for same on 9 October 2015 and was eligible for same since she assumed higher duties in 2009.

Learned Counsel for the Disputant has notably submitted that the Disputant reported the dispute regarding recognition of her higher qualification in 2009 after she was confirmed (in her appointment) and this is when the increment becomes due. The dispute started well before the written request was made, which is well before three years as stipulated in the *Act*.

Under the second objection raised, Learned Counsel stated that the Disputant firmly believes that the present dispute constitutes a labour dispute as defined under *section 2* of the

Act. The case of the Disputant is not to challenge the *PRB Report 2008* or *2013* but the implementation of *recommendations 18.9.19* and *18.10.13* of the *PRB Report 2008*. Reference was made to the case of *Government General Services Union and Government of Mauritius* (*RN 975*) cited in *S. Dawon& others and MITD* (*ERT/RN 163/15 to 170/15*), wherein the Tribunal stated that '*the disputes before us are in relation to qualification and responsibility which may have a bearing incidentally on increment*' in overruling the objection. Counsel submitted that the dispute is a labour dispute that may have an incidental bearing on remuneration and that it was clearly reported within three years after the act or omission which gave rise to it.

The Respondent has, in effect, raised a two-fold plea *in liminelitis* in the present matter. This concerns both aspects of the Terms of Reference of the dispute. Under the first limb of the objection, the Respondent contends that the disputes were reported more than three years after the act or omission which gave rise to them.

The relevant provision in relation to this particular objection is *paragraph (c)* of the definition of a labour dispute under *section 2* of the *Act*. This provides as follows:

> *"labour dispute" –*
>
> *…*
>
> *(c) does not include a dispute that is reported more than 3 years after the act oromission that gave rise to the dispute;*

It is clear that a labour dispute does not include a dispute that is reported more than three years after the act or omission that gave rise to the dispute. It is therefore incumbent on the Tribunal to ascertain what is the act or omission which gave rise to each of the two disputes as per the present Terms of Reference.

Under the first aspect of the Terms of Reference of the dispute, the Disputant is asking to be granted one increment for her higher relevant qualification acquired prior to her recruitment at the Respondent. It has not been disputed that the Disputant was offered appointment to the post of Personnel Officer (later restyled to Senior Human Resource Officer by the PRB in 2008) via a letter dated 24 March 2008. She accepted same and assumed duty on 2 April 2008. As per the Terms of Reference and her Statement of Case (*vide* paragraphs 3 and 4), she was already holder of the higher relevant qualification when assuming duty at the National Transport Corporation.

It would therefore stand to reason that the omission to pay her an increment for her higher relevant qualification is what has given rise to this particular dispute and this occurred as from 2 April 2008, being the date from when the increment would be due to her as she was already holder of the higher qualification when assuming duty at the Respondent corporation. It cannot also be overlooked that the Disputant herself has stated that she made a verbal request for the increment in 2009, which reveals that she believed that she was entitled to same as far back as this time. The present dispute having been reported to the CCM on 10 April 2017 in accordance with *section 64 (1)* of the *Act*, it is clear that the dispute under the first paragraphof the Terms of Referencehas been reported more than three years after the omission that gave rise to it.

The Tribunal is now concerned with whether the dispute under the second paragraph of the Terms of Referencehas been reported more than three years after the act or omission which gave rise to it. Under this aspect of the Terms of Reference,the Tribunal is being asked to enquire into whether the Disputant should be paid a responsibility allowance for having performed higher additional duties and responsibilities of the Industrial Relations Officer.

A perusal of the Disputant's Statement of Case reveals that she was on 17 December 2009 assigned higher duties of Industrial Relations Officer pertaining to welfare and industrial relations (*vide* paragraph 11); on 30 September 2010, she was assigned duties as listed at numbers 1 and 2 of the scheme of service of the post of Industrial Relations Officer (*vide* paragraph 12); and on 18 March 2011, she was assigned higher duties as listed at number 4 of the aforesaid scheme of service (*vide* paragraph 13). Furthermore, as per her evidence before the Tribunal, the Disputant stated being eligible for the responsibility allowance since she assumed higher duties in 2009.

It is therefore clear that the act of the Disputant being assigned higher duties of the Industrial Relations Officergave rise to the dispute under the second paragraph of the Terms of Reference and this arose as from 17 December 2009. The dispute having been reported on 10 April 2017 to the CCM,the Tribunal can only find that this was done more than three years after the act which gave rise to the dispute under the second paragraph of the Terms of Reference.

In relation to the second limb of the plea *in liminelitis*, the Respondent is contending that the dispute does not constitute a labour dispute since the Disputant has exercised an option to be governed by the recommendations of the *PRB Reports* of *2008* and *2013*.

This aspect of the objections relates to *paragraph (b)* of the definition of a labour dispute found under *section 2* of the *Act*. This provides as follows:

> *"labour dispute" –*
>
> *…*
>
> *(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;*

From this provision, it clearly follows that a labour dispute does not include a dispute by a worker made as a result of the exercise of an option to be governed by the recommendations made in a *PRB Report* (as is applicable in the present matter) in relation to remuneration or allowances of any kind.

Moreover, the following may be noted from what was stated by the Supreme Court in *Federation of Civil Service and Other Unions and others v The State of Mauritius and anor*. [*2009 SCJ 214*] in relation to the aforementioned exclusion expressed in the definition of a labour dispute:

> *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.*

The following may also be noted from the award of the Tribunal in *Government Services Employees Association and The State of Mauritius* (*ERT/RN 65/17*):

> *In endeavouring to curtail an abundance of labour disputes arising on issues upon which a Disputant has in writing agreed to initially and soon after changes his mind to contest it, parliament brought in changes to the law. Anyone challenging issues in relation to remuneration and/or allowance of any kind is debarred from doing so if he has opted for such remuneration and/or allowance of any kind.*

Regarding the first paragraph of the Terms of Reference of the dispute, the Disputant is essentially asking to be granted an increment for her relevant higher qualification. Does the grant of the increment therefore amount to '*remuneration or allowance of any kind*' as is stipulated under *paragraph (b*) of the definition of a labour dispute? It should be noted that an increment is described as follows at *paragraph 18.9.1* of the *PRB Report 2016 Volume I*:

> ***Increment***
>
> *18.9.1* *The salary of grades in the Public Sector consists of segment/s of a Master Salary Scale. Most grades have a salary scale comprising an initial and a top salary point and movement from the initial to the top salary point is incremental. A few grades have a flat salary. Increment on a salary scale is not as of right. It is a method for rewarding those who have demonstrated adequate yearly progress and whose work and conduct have been satisfactory. On appointment, an officer is normally granted the initial salary (in the salary scale of the grade), which is guaranteed (for an incumbent in the grade) and any movement in the scale has to be earned.*

As may be gleaned from this description, increment is directly related to salary being the movement from the initial to the top point of the salary scale. Would the granting of an increment therefore fall under the ambit of the term '*remuneration*'? Although the term '*remuneration*' has not been defined in the *Act*, the following may be noted from what the Supreme Court stated in *A.J. Maurel Construction Ltee v Froget* [*2008 MR 6*]:

> *Remuneration includes salary and the benefits that may be said to go with the salary or "the salarium" which includes the "accessories:" see Jean-Emmanuel Ray Droit du Travail, Droit Vivant p. 173, para 123.*

The following may also be noted from *J. Pélissier*, *G. Auzero* and *E. Dockès* in *Droit du travail*, *Précis Dalloz*, *26ᵉ édition*, *p.875, 876, note 851* on the issue of remuneration in relation to salary:

> *Une distinction est ainsi introduite entre une notion large de rémunération de l'emploi, et une notion plus étroite de salaire, qui serait essentiellement le prix de base du travail fourni. Mais les expressions de « salaire » et de « rémunération (du travail) » sont souvent employées, dans le Code du travail, comme synonymes. Il faut donc admettre que « salaire » possède, dans la langue du droit du travail, un sens étroit (salaire de base) et un sens large (ensemble du salaire de base augmenté des «*

compléments du salaire », qui en sont des « éléments constitutifs »), dans lequel il a pour synonyme « rémunération ».

It is thus clear that as increment is directly related to the concept of salary, it would amply fall within the ambit of the term '*remuneration*'. It has not been disputed that the Disputant opted for the *PRB Reports* in 2008 and 2013 as evidenced by the two Option Forms produced. A dispute concerning the grant of an increment would not therefore be deemed to be a labour dispute pursuant to *paragraph (b)* of the meaning of a labour dispute under *section 2* of the *Act*.

The Tribunal has taken note of the Disputant's argument to the effect that the *PRB Reports* of *2008* and *2013* are not being contested but she is disputing the implementation of *recommendations 18.9.19* and *18.10.13* of the *PRB Report 2008*. However, *ex-facie* the first paragraph of the Terms of Reference of the dispute, there is no reference to any recommendation of the *PRB Report* in relation to her higher relevant qualification nor on whether same has been properly applied to her circumstances. What this aspect of the Terms of Reference is clearly asking the Tribunal to enquire into is whether the Disputant should be granted an increment for the reasons given therein. It cannot therefore be said that the aforesaid paragraph of the Terms of Reference is expressly asking the Tribunal to enquire into the implementation of certain recommendations of the *PRB Report*.

The Disputant has sought support from a previous decision of the Tribunal in *Government General Services Union and Government of Mauritius* (*supra*), whereby the objection raised was overruled. In that matter, the Tribunal ruled that the disputes were in relation to qualification and responsibility which may have a bearing incidentally on increment. It is trite law that each case must be decided on its own facts and that as per the current Terms of Reference, particularly on the first limb thereof, the dispute is in relation to the grant of an increment and there is no issue regarding qualification or implementation of any recommendation of the *PRB Report*. It should also be noted that in the case of *S. Dawon& others and MITD* (*supra*), where the former decision was cited, the objections relating to *paragraph (b)* of the definition of a labour dispute under the *Act* were upheld.

The same objection relating to *paragraph (b)* of the definition of a labour dispute has been raised in relation to the second paragraph of the Terms of Reference of the dispute. Under this, the Disputant wishes to know if she should be paid a responsibility allowance for having performed additional higher duties and responsibilities of the Industrial Relations Officer.

In essence, it is clear that the Disputant is asking for the payment of a responsibility allowance. *Paragraph (b)* of the definition of a labour dispute under *section 2* of the *Act* is widely worded and expressly refers to '*allowances of any kind*'. This would certainly include a responsibility allowance. Thus, once the Disputant has opted for the *PRB Report*, she cannot declare a dispute in relation, *inter alia*, to allowances of any kind. It should also be noted that there is no issue of implementation of any recommendation of the *PRB Report* in relation to this aspect of the dispute as per its Terms of Referencenor has this been invoked in the Disputant's Statement of Case.

Although, the Tribunal's previous decision in*Government General Services Union and Government of Mauritius* (*supra*) has been referred to by Counsel for the Disputant, the Tribunal cannot be bound by same and notes that this decision was not followed by the Tribunal in *S. Dawon& others and MITD* (*supra*) despite making reference to same.

As the Disputant has opted to be governed by the *PRB Reports* of *2008* and *2013*, she cannot now declare a dispute in relation to the payment of a responsibility allowance as such a dispute is expressly excluded under *paragraph (b)* of the definition of a labour dispute under *section 2* of the *Act*.

The Tribunal therefore finds that both aspects of the plea *in liminelitis* raised by the Respondent to the Terms of Reference of the dispute must succeed.

The present dispute is therefore set aside.

SD ShameerJanhangeer
(Vice-President)

SD FrancisSupparayen
(Member)

SD Karen K. Veerapen (Mrs)
(Member)

SD ParmeshwarBurosee
(Member)

Date: 10th October 2018