

EMPLOYMENT RELATIONS TRIBUNAL

RULING

ERT/ RN 33/24, ERT/ RN 34/24, ERT/RN 37/24, ERT/ RN 39/24, ERT/ RN 40/24, ERT/ RN 41/24, ERT/ RN 44/24, ERT/ RN 46/24

Before

Indiren Sivaramen	Acting President
Anundraj Seethanna	Member
Chetanand K. Bundhoo	Member
Ghianeswar Gokhool	Member

In the matter of:-

ERT/RN 33/24 - Mr Yagieshwarnath Krishnadass Jankee (Disputant)

And

The SBM Bank (Mauritius) Ltd (Respondent)

The above case and cases mentioned below have been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(9)(b) of the Employment Relations Act, as amended (hereinafter referred to as “the Act”). The terms of reference of the point in dispute in the first case (ERT/RN 33/24) read as follows:

I joined the bank in December 1982 and have worked for over 38 years; only at the SBM.

My dispute is that on 26.02.2018 the bank informed me, by way of a letter, that for administrative purposes my date of joining shall be in June 2016; as if I joined at age of 54 and only about 5 years ago. This looks more a cunning strategy and a colorable device than anything else. The denial reduced my vacation leaves rights by 18 days yearly for the next 8 years, up to retirement age. It also entitles the bank to shift my pension scheme from the SBM Defined Benefits to the relatively disadvantageous SBM Defined Contribution to which I strongly disagree.

In the other cases, the terms of reference read as follows:

ERT/RN 34/24

Mr Moothoosamy Kunthasami

And

The SBM Bank (Mauritius) Ltd

“I have worked very hard with full commitment and loyalty to the SBM Bank (Mauritius) Ltd for over 43 years. And in some way I have been largely contributing to the rapid growth of the institution. Also through my skills and knowledge acquired along with my academic studies over the year at the bank, I proved to carry out my work both effectively and efficiently as recognized by my employer. But I am presently being denied of a reasonable pension amount while going on retirement by the end of this month in April 2022.”

ERT/RN 37/24

Mrs Megwantee Ramgoolam

And

The SBM Bank (Mauritius) Ltd

“I joined the bank in January 1988 and as at date I have accumulated 34 loyal continuous years of service and its corresponding retirement benefits. But, as per HR records, the bank is unilaterally counting my date of joining as 01.07.2013, i.e. joining at the age of 47. Consequently, many acquired rights which are based on joining date and years of service are denied to me.”

ERT/RN 39/24

Mr Nayendrah Reechaye

And

The SBM Bank (Mauritius) Ltd

“After 41 (forty-one) years of loyal service at the bank, I am deriving benefits amounting to Rs15,112 (fifteen thousand one hundred and twelve) upon my retirement in May 2021.”

ERT/RN 40/24

Mr Poorun Kumar Ramgoolam

And

The SBM Bank (Mauritius) Ltd

“I joined the bank in 1987 and as at date I have accumulated 34 loyal continuous years of service and its corresponding retirement benefits. But, as per HR records, the bank is unilaterally counting my date of joining as 29.11.2013, i.e. joining at the age of 47. Consequently, many acquired rights which are based on joining date and years of service are denied to me.”

ERT/RN 41/24

Mr Kalam Hossanee

And

The SBM Bank (Mauritius) Ltd

“Years of service impacting on retirement lump sum & pension.”

ERT/RN 44/24

Mr Satyajit Betchoo

And

The SBM Bank (Mauritius) Ltd

“I joined the bank in June 1981 and as at date I have accumulated 40 loyal continuous years of service and its corresponding retirement benefits. But, by way of a letter dated 12.08.2019 addressed to me, the bank is unilaterally counting my date of joining as 01.04.2013, i.e. joining at the age of 53. Consequently, many acquired rights which are based on joining date and years of service are being denied to me.”

ERT/RN 46/24

Mr Gowtam Hauzaree

And

The SBM Bank (Mauritius) Ltd

“My dispute is that although in the HR records it is clearly mentioned that I am working for the bank since January 1989 (33 years) but my pension will be computed only since September 2016 (5.5 Years). Moreover, the bank has moved my pension scheme from the SBM Defined Benefits to the relatively disadvantageous SBM Defined Contribution without informing us about same”.

The Respondent has taken Preliminary Objections in law in all these cases and the preliminary objections (which are similar in all the cases) read as follows:

“Preliminary Objections in law

1. The Disputant’s present action falls outside the jurisdiction of the Employment Relations Tribunal inasmuch as:

- (i) the alleged “dispute” in relation to retirement pension under the SBM Group Defined Contribution Fund is not a labour dispute as provided in Section 2(a) of the Employment Relations Act 2008 (Act No.32 of 2008), which reads as follows:

“(a) means a dispute between a worker, a recognised trade union of workers or a joint negotiating panel, and an employer which relates wholly or mainly to –

- (i) ***the wages, terms and conditions of employment of, promotion of, or allocation of work to, a worker or group of workers;”***

The pension fund is managed by the State Insurance Company of Mauritius (SICOM) and any request for information must be directed to SICOM.

- (ii) the “dispute” is not a labour dispute as it does not fall within the definition of a labour dispute as provided in Section 2(c) of the Employment Relations Act 2008 (Act No.32 of 2008), which reads as follows:

“does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute”.

Therefore, the Respondent moves that the present Application be dismissed, with costs.”

The above cases have not been consolidated but counsel for all the disputants and counsel for the Respondent have agreed that for the purposes of the arguments all eight cases may be taken together since the same preliminary objections were being taken in all eight cases.

All parties were thus assisted by counsel before the Tribunal.

The Tribunal proceeded to hear arguments from both counsel on the preliminary objections. At the outset, it is apposite to note that all the averments made on behalf of the disputants in their Statements of Case are deemed to be accepted for the purposes of the preliminary objections.

Counsel for the disputants called Mr Jankee, the Disputant in the first case, to depone to clarify certain issues as per his Statement of Case. Mr Jankee stated that he joined the bank in 1982. He stated that he was governed by the defined benefits (DB) pension scheme. In 2008, he was placed on contract. As from 2008, the pension scheme would now be the defined contribution (DC) pension scheme. He stated that the Head of Human Resources did not tell him what would be his pension on attaining 60 years, which was then the retirement age, but he was simply told that he will be better off. In 2013, his contract of employment was renewed for a period of three years. No figures were communicated to him at that time as to what would constitute his pension at the age of retirement. In 2018, his contract of employment was extended for a period of five years. Even then, he was not informed of the quantum of his pension. Mr Jankee confirmed that, as per the terms of reference of his dispute, his dispute “is 26th February 2018”. He suggested that he had queried with the then CEO first and that the latter allegedly informed him that the issues of pension and years of service would be settled. The latter resigned and he met the replacing CEO who told him that he would look into the matter. Nothing happened and he met the Chairman of the bank who allegedly told him that this should be addressed. The latter has also resigned, and he met the Chairman of SBM Holdings. The latter reassured him that he would look into the matter. Even then, nothing happened. He stated that he was referred to the pension administrator, SICOM, by the HR people of the Respondent. He stated that it was only on 2 August 2021 that he was informed by the pension administrator of the pension he would derive upon reaching 60 years. He then started legal proceedings and reported a case to the Commission for Conciliation and Mediation. When questioned by counsel for the Respondent, Mr Jankee stated that he has signed the different contracts not wholeheartedly. When asked if he had reported same as a dispute to the CCM, he stated that the culture at the bank is to try to solve issues within the bank itself and not to go outside. He suggested that for the DC pension scheme, the administrator will never work one’s pension figures unless one is sixty years old. He did not agree when it was put to him that the bank had already informed him on 26 February 2018 and that he had failed to take appropriate steps in a very timely manner. He maintained that it was only when the bank stated in 2021 that it

would not give anything that the dispute arose. He did not agree that the dispute arose on 26 February 2018.

Both counsel offered submissions on the preliminary objections in law. The Tribunal has examined carefully the evidence adduced so far, the submissions of both counsel and the pleadings before it. The same preliminary objections are being taken in all eight cases. Though the Tribunal has wide powers to deal with employment relations matters, the Tribunal obviously can only intervene and enquire into a dispute where the dispute referred to it is a 'labour dispute' as defined under section 2 of the Act. The first objection taken is that the alleged "dispute" in relation to retirement pension under the SBM Group Defined Contribution Fund is not a labour dispute as provided in section 2(a) of the Employment Relations Act 2008 (Act No. 32 of 2008), which reads as follows:

"(a) means a dispute between a worker, a recognised trade union of workers or a joint negotiating panel, and an employer which relates wholly or mainly to –

the wages, terms and conditions of employment of, promotion of, or allocation of work to, a worker or group of workers

The Tribunal has examined carefully the terms of reference of the disputes referred to the Tribunal (in all eight cases) and it cannot state with certainty, at this stage, that all the disputes relate wholly to retirement pension under the SBM Group Defined Contribution Fund. However, in two cases it is clear that the disputes relate wholly or mainly to retirement pension under the SBM Group Defined Contribution Fund. Indeed, in those two cases, the disputants have already retired and benefited from their retirement pension. Their disputes are wholly or mainly in relation to their retirement pension under the SBM Group Defined Contribution Fund. These are also disputes of rights and not disputes of interests. The Tribunal has delivered a ruling in the consolidated cases of **Mr Hassen Soodhoo and others And Sugar Insurance Fund Board, RN 24/14-RN 47/14** (delivered on 11 July 2014) which were in relation to a 'Voluntary Retirement Scheme'. In those cases, the Tribunal examined lengthily the definition of 'labour dispute' including the terms 'wages' and 'terms and conditions of employment' mentioned therein. The Tribunal also addressed the issue of "disputes of rights" and "disputes of interests". The Tribunal will quote extensively from that ruling. The Tribunal stated the following in the cases of **Mr Hassen Soodhoo and others (above)**:

"The cases have been consolidated and the terms of reference are the same in all the cases and read as follows:

"Whether based on the BCA Consulting Report on the Review of the Organisation Structure and Human Resource Requirements at the Sugar Insurance Fund Board May 2013, I should have been granted the Voluntary Retirements Scheme in harmony with that of the MCIA, but this has not been the case. REF 4.1.3 and 4.2.2."

Learned counsel for the Respondent has taken a preliminary point in limine litis which reads as follows:

“The Sugar Insurance Fund Board (hereinafter referred to as the “SIFB”) avers that the above Tribunal has no power and/or jurisdiction to entertain the present matter. One of the reasons in support of such a proposition is that there is no labour dispute under the law. The other obvious reason is that there exists between the Disputant and the Respondent a contractual obligation governed by the Civil Code which it is not possible to vary except by first cancelling the existing contract: an exercise for which the Tribunal has no jurisdiction.

The SIFB therefore prays that the present case be set aside.”

The Tribunal proceeded to hear arguments from both counsel on the preliminary point in limine litis. A copy of an option form (similar forms were, according to learned counsel for Respondent, signed by all the disputants) signed by one of the disputants was produced and marked Doc A. Counsel for Respondent informed the Tribunal that he was in fact taking two points in limine litis and that the first one was that the Tribunal has no jurisdiction to go into whether there was some form of ‘dol’ since this would be a civil matter which goes completely outside the labour relations existing between an employer and an employee. It will not correspond to the definition of a labour dispute. He added that the contract by virtue of Article 1134 of the Civil Code will be the law of the parties. Until and unless the competent court says that the contract is tainted with ‘dol’, one cannot go behind the document. Under the second point in limine litis, learned counsel argued that there is no ‘dispute’ as per section 2 of the Employment Relations Act (the “Act”) since the option concerns retirement and the workers will stop working and have already cashed the sum offered.

Counsel for the disputants argued that worker includes a former worker under the Act. He referred to the definition of ‘labour dispute’ and suggested that it has a broad ambit and would include any element in connection with the employment which flows from the relationship between employer and employee. A labour dispute would include a dispute in relation to pensions, lump sums or any sums payable by virtue of the employment of the worker. As far as the point raised in relation to Article 1134 of the Civil Code is concerned, he argued that in the realm of industrial relations, an employment contract or any contract flowing from that relationship has a special character. Contracts arising out of that relationship would be considered, according to him, as “contrats d’adhésion” and thus escape the rigidity of Article 1134 of the Civil Code. Counsel added that these were disputes of interests and not disputes of rights.

The Tribunal has examined the arguments of both counsel. (...)

“Labour dispute” is defined in section 2 of the Act as follows:

“labour dispute” – 1(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) does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute

The dispute is no doubt between an employer and a worker since “worker” is in any event defined in the Act as including a former worker. “Wages” is defined in the Act as meaning “all the

emoluments payable to a worker under a contract of employment". The term "emoluments" is not defined in the Act. In the case of **Tyack L. Gerard v Air Mauritius Ltd & others 2010 SCJ 257**, the Supreme Court dealt with the issue of pensions and stated the following:

*Pensions is not a privilege. It is not a remuneration. It is not an allowance. It is not a bonus. It is a right which has been earned by a state of affairs; in this case by work over the years. In this sense, pensions have been referred to as deferred remuneration. What an employee has earned as his pension benefit is a right up until the termination of his contract for whatever reason he should obtain. And those who administer a Pensions Scheme become a trustee of the accruals: In the words of Lord Millet who delivered Judgment of the Law Lords of the Judicial Committee: "As has been repeatedly observed, their rights are derived from their contracts of employment as well as from the trust instrument. Their pensions are earned by their services under their contracts of employment as well as by their contributions": **Air Jamaica Ltd v. Charlton (P.C.)**, 1 WLR 1399 and **M. J. C. L. Robert Lesage v. Mauritius Commercial Bank and Anor [2004 MR 63]** and the cases cited therein [**Barber v Guardian Royal Exchange Society [1990] ICR 616; Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589; Mihlenstedt v Barclays Bank International Limited [1989] IRLR 522; Scally v Southern Health and Social Services Board [1992] AC 294; Johnson v Unisys 2001 [UKHL] 13; University of Nottingham v Eytell [1999] ICR 721; BG Plc v O'Brien [2002 IRLR 444.]***

For the purposes of tax law and by virtue of section 2 of the Income Tax Act, "emolument" includes pensions. Thus in the case of **Chettiar V.V & others v MRA 2013 SCJ 364**, the Supreme Court stated the following:

[16] *The above is clear as clear could be that the legislator has defined emoluments. And in the legislator's definition, emolument includes pensions. In fact it includes pension by a wide variety of names: super-annuation, retiring allowance, annuity or other reward in respect of or in relation to past employment etc.*

However, we are in the realm of employment relations and reference to tax provisions may not be suitable the more so when there are more appropriate indicators in related legislation such as the Employment Rights Act. Indeed, remuneration (which includes all emoluments) is specifically dealt with under Part V of the Employment Rights Act whereas items such as gratuity on retirement, grants, recycling fees and severance allowances are dealt with separately under Part X of the said Act under the heading "Compensation". The Tribunal will also refer extensively to a judgment of the Supreme Court in the case of **M.Boojhawon v C. Askurn 2008 SCJ 172**, where Her Ladyship J. Peeroo stated the following:

Since what is prevented by section 38 of the Courts (Civil Procedure) Act is an attachment or saisie arrêt in respect of any sum of money that is due by way of salary, it has to be decided whether the cash compensation paid under the Act can be assimilated into that. The ordinary meaning of "by way of salary" has to be read into that section. According to the New Oxford Dictionary of English, the phrase "by way of" means either constituting, as a form of or by means of. "Salary" means "a fixed regular payment, typically paid on a monthly basis but often expressed as an annual sum, made by an employer to an employee, especially a professional or white-collar worker".

The notion of salary has no doubt evolved over the years. It no longer simply connotes the payment made by the employer in return for the work supplied by the employee, which normally forms the basis of a contract of employment for a valuable consideration - contrat à titre onéreux.

*In **Jurisclasseur Travail, vol. 3, Vo Salaire et accessoires, Fasc 25-10, Notion de salaire** the following extract is relevant to gauge the original meaning of wages:*

*« 9. ... Il constitue la prestation fournie par l'employeur **en contrepartie du travail** accompli à son profit. Ainsi, tout contrat de travail implique un salaire et il n'existe pas de salaire hors du contrat de travail. La jurisprudence a souvent eu l'occasion de l'affirmer... Plus précisément, le versement du salaire constitue pour l'employeur l'obligation essentielle issue du contrat ; à la prestation fournie par le travailleur correspond le salaire versé : les deux obligations sont réciproques et interdépendantes, l'une ne se conçoit pas sans l'autre. »*

Under section 2 of the Labour Act the definition of "salary" and "wages" are not given but it is therein provided that "remuneration" –

(a) means all emoluments earned by a worker under an agreement;

(b) includes –

(i) any sum paid by an employer to a worker to cover expenses incurred in relation to the special nature of his work; and

(ii) any money to be paid to a job-contractor, for work, by the person employing the jobcontractor;

(c) does not include money due as a share of profits;"

Now, the meaning of "emolument" or "emoluments" in the New Oxford Dictionary of English is "a salary, fee, or profit from employment or office". In contrast to "salary" defined earlier, "wage or wages" means "a fixed regular payment, typically paid on a daily or weekly basis, made by an employer to an employee, especially to a manual or unskilled worker".

*A worker's wages, salary or emoluments are obviously the pay made by the employer to his employee under a contract of employment. Emoluments or remuneration may include the wages or salary for the work performed by the worker in the enterprise as well as all the privileges given by the employer not as a counterpart of the work supplied but to satisfy the needs of the worker. In certain cases, and especially in France, the notion of salary is given a much wider concept so as to include a social element. Nevertheless, the fact remains that the notion of wages or salary, and in any case, that of the basic salary, is not conceivable without there being work supplied in return – vide **Jurisclasseur Travail, vol. 3, Vo Salaire et accessoires**, (supra) in **note 12** the relevant part of which reads as follows:*

«...Mais cette extension du salaire ne doit pas pour autant masquer le fait que si la corrélation travail-salaire ne suffit pas, à elle seule, à caractériser le salaire, elle reste néanmoins le principe en dehors duquel on ne peut déterminer le salaire, le salaire de base tout au moins. »

In my view, it is clear that salary cannot be dissociated from and has to have as its counterpart work supplied by the worker. There is also nothing to suggest that the word "salary" must be construed differently in the context of section 38 of the Courts (Civil Procedure) Act.

This decision was upheld on appeal in **C.Askurn v M.Boojhawon 2010 SCJ 2**. Though that case dealt specifically with a provision of the Courts (Civil Procedure) Act, the Tribunal finds that in the context of the present Act, "wages" has also to have as its counterpart work supplied by the worker. The Tribunal finds that the benefits/lump sums paid in all the twenty-four cases (as agreed by counsel for disputants) and the quanta of which are now being challenged do not constitute "wages" as used in the definition of "labour dispute" in the Act.

Now, are the terms and conditions of the Voluntary Retirement Scheme (VRS), terms and conditions of employment of the disputants? For the disputes to be within the jurisdiction of the Tribunal, the disputes have to relate wholly or mainly to terms and conditions of employment (as per section 2 of the Act). A VRS provides an alternative way by which a worker (who is eligible thereto) may retire from his work. Until a worker has opted for a proposed VRS, the VRS forms part of the terms and conditions of employment of that worker. It is for the worker to decide whether to make use of the VRS or not. In the present matter, the VRS along with other terms and conditions of employment emanate from the BCA Consulting Report. Thus, a dispute in relation to the VRS itself is within the jurisdiction of the Tribunal.

However, since each disputant has signed an option form (ex facie the statements of case and in line with Doc A) and has benefitted from the VRS and been paid accordingly, can they be allowed to challenge the terms of the VRS before this Tribunal? The answer is no. Counsel for disputants rightly made reference to “disputes of rights” and “disputes of interests” but erred in arguing that the workers were raising “disputes of interests”. In a **Handbook on Alternative Labour Dispute Resolution by F.Steadman** (under the aegis of the **International Training Centre of the International Labour Organisation**), ‘interests dispute’ is defined as one ‘*which arises from differences over the determination of future rights and obligations, and is usually the result of a failure of collective bargaining. It does not have its origins in an existing right, but in the interest of one of the parties to create such a right through its embodiment in a collective agreement, and the opposition of the other party to doing so.*’ In this particular case, the disputants have signed option forms accepting the conditions of the VRS. The terms of the option form (as per Doc A) are quite telling:

“I, do confirm that I have taken cognizance of the offer made to me by the Board for voluntary retirement under the Voluntary Retirement Scheme (VRS) devised in the context of the review of the human resources requirements at the SIFB.

I hereby certify that I am opting for voluntary retirement under the above mentioned VRS on the terms and conditions set out in the report, which I have taken cognizance of (extract of offer enclosed).

I understand that this option is irrevocable. I also understand that if I decline the offer, I shall continue to receive the salary I am presently drawing and shall be governed by provisions of existing Retirement Benefits scheme.”

They could not accept something in the morning to challenge it in the afternoon. The Tribunal will here refer to the ruling delivered in the case of **T.S.M Cunden & others And Technical School Management Trust Fund, RN 1028** where the Tribunal stated the following:

“We fully endorse Counsel for the Respondent’s stand that having entered into an agreement in the morning, only to disagree over it in the afternoon is simply unacceptable and the Tribunal is not to condone such flouting attitude. A contract is a binding document and we are not here to enter into conspiracy to any breach of signed agreement. Certainly, the matter would have been different if the disputed issues are in fact issues that are foreign and/or independent of what had been agreed. But here, those employees had already reached an agreement on the salary and grading issues. We have gone through all the authorities cited to us by Counsel and we find nothing to add except that it is trite law that one cannot go “contre et outre” le contenu de l’acte”.

In the case of **T.S.M Cunden & others (above)**, the Tribunal referred to the judgment of the Supreme Court in the case of **Federation of Civil Service and Other Unions and others v. The State of Mauritius and The Attorney-General 2009 SCJ 214** and previous rulings/awards of the

Tribunal in **Telecommunications Workers Union and Mauritius Telecom, RN 754** and **University of Mauritius Academic Staff Association and University of Mauritius, RN 980**.

At the same time, this stand would be along the lines of part (b) of the definition of “labour dispute” in section 2 of the Act. For ease of reference, part (b) of the definition, as amended by Act No. 5 of 2013, is reproduced below:

“(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”

Terms and conditions of employment may be challenged before the Tribunal but in this particular case by opting for the VRS, and cashing the benefits of the VRS, the workers have brought an end to their contracts of employment. The terms of the VRS are no longer terms and conditions of employment which they can benefit in the future but already terms and conditions of the termination of their contracts of employment. The present matter is thus in relation to the terms and conditions of the termination of their contracts of employment (more specially the lump sum paid or VRS sum as the disputants have put it) or more simply in relation to the termination of their contracts of employment. Termination of contracts of employment is specifically provided for under Part VIII of the Employment Rights Act and apart from the Employment Promotion and Protection Division set up under Section 39A of the Employment Rights Act, there is nothing to suggest that the Tribunal has jurisdiction in relation to termination of contracts of employment (**vide Mr Sheryad Hosany and Cargo Handling Corporation Ltd, RN 40/13**). In the said case of **Mr Sheryad Hosany (above)**, the Tribunal stated the following:

“The Employment Relations Act as its name suggests relates to employment relations and save for “reinstatement” (to be dealt with further down) all the items specifically mentioned in the definition of “labour dispute” relate to situations whereby the contract of employment between the worker and the employer still exists and has not been severed.”

The terms of a VRS may, in an appropriate case, be challenged before the Tribunal (as sought to be done here) but this will be achieved by way of a proper “dispute of interests”. The manner in which each and every of the 24 workers is trying to challenge the terms of the VRS by invoking pressure/coercion prior to the signing of the option forms is not the proper way to proceed before the Tribunal and is outside the jurisdiction of the Tribunal. (...)

Though there have been amendments brought to the law since the ruling delivered by the Tribunal in the consolidated cases of **Mr Hassen Soodhoo and others (see above)** (be it with the Workers’ Rights Act (which repealed the Employment Rights Act) or amendments brought to the Employment Relations Act), there is nothing to indicate that retirement pension under the SBM Group Defined Contribution Fund would fall under remuneration or wages. In fact, the Workers’ Rights Act contains a whole new Part (separate from Remuneration or General Conditions of Employment) dealing with Portable Retirement Gratuity Fund including contributions to that Fund, contributions for past services and so on.

Also, in the case of **Mr Dhanrajsing Ramlugun And Air Mauritius Ltd, ERT/RN 34/2023**, the Tribunal has considered whether the issue of pension (yearly pension contribution) fell under the definition of ‘labour dispute’. The contract of employment of the disputant had already come to an end in that case. The Tribunal referred, among

others, to the cases of **L.Gerard Tyack v Air Mauritius Ltd & SICOM, 2010 SCJ 257** and **M.J.C.L.Robert Lesage v Mauritius Commercial Bank Ltd & Mauritius Commercial Bank Ltd Superannuation Fund, 2004 SCJ 313** (both cases cited before us) and stated the following:

“Thus, the Disputant’s pension rights, although founded in the contract of employment, are covered by the AMLPS and its applicable rules. It would therefore be apposite to note the following from the decision in *Lesage (supra)*:

There is enough case-law which have held that pensions, unlike other benefits afforded to employees, are rights which exist independently of contracts of employment. The case of Air Jamaica Ltd v Joy Charlton [1999] 1 WLR 1399 decides that as with share schemes, the rights of employees to pension benefits may be separate from the contract of employment and the terms of the Pension Scheme govern the employees’ entitlement. Lord Millet in the case pointed out that it was unusual for the pension scheme to exist as a contract between employer and employee and that the usual scheme involved the operation of the pension through a trust scheme. (The underlining is ours.)

...

Thus, bearing in mind the definition of wages under the Act, the pension does not amount to emoluments being paid to the Disputant under the contract of employment. Moreover, as noted from *Tyack (supra)*, it was clearly held that pension is not remuneration despite it being described as deferred remuneration.”

The Tribunal has no hesitation in finding that ‘retirement pensions’ are rights which exist independently of contracts of employment. Also, ‘retirement pension’ is earned or paid only after a contract of employment comes to an end. A dispute in relation to ‘retirement pension’ which, in the case of Mr Jankee, involves SICOM (as mentioned by Mr Jankee himself), presumably as pension scheme administrator, may not be a dispute between a worker and an employer only. As highlighted above, the Tribunal is satisfied that ‘retirement pension’ as such does not fall within “wages” and is not an actual term and condition of employment.

All these cases have been reported to the President of the Commission for Conciliation and Mediation in 2022 and they have been referred to the Tribunal in 2024. At the time the disputes were reported, ‘labour dispute’ was defined as follows in section 2 of the Act as it was then:

“*labour dispute*” –

1(a) means a dispute between a worker, a recognised trade union of workers or a joint negotiating panel, and an employer which relates wholly or mainly to-

(i) the wages, terms and conditions of employment of, promotion of, or allocation of work to, a worker or group of workers;

(ii) the reinstatement 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) does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute

In the cases of **Mr Moothoosamy Kunthasami (ERT/RN 34/24)** and **Mr Nayendrah Reechaye (ERT/RN 39/24)**, apart from the different contracts which have been signed by the relevant parties, the disputants are being paid a monthly pension and must have signed the 'Retirement Option Form' (annexed as Doc H (page 2 of the document) to the statement of case of Mr M.Kunthasami). Having agreed to their retirement pensions, the two disputants cannot challenge the retirement pensions (which is not 'wages' and not terms and conditions of their employment with Respondent) paid to them. In the case of Mr Kunthasami, the Tribunal will go further and refer to the second page of the document (Doc H) where it is clearly written "*I, the undersigned, hereby opt for Option 2 as per letter dated 06 May 2022 and understand that my option is irrevocable.*" Curiously, in the case of Mr N.Reechaye though the first page of Doc I annexed to the Statement of Case of Mr N Reechaye indicates that there is a page 2 and that the option must be exercised by completing the form on page 2, this page 2 has simply not been provided to the Tribunal by the disputant. For all the reasons given above and the ruling in the cases of **Mr Hassen Soodhoo and others (above)**, the Tribunal has no hesitation in finding that the disputes in the cases of Messrs M. Kunthasami (ERT/RN 34/24) and N. Reechaye (ERT/RN 39/24) relate wholly or mainly to retirement pension and are thus not labour disputes and are not within the jurisdiction of the Tribunal. The two cases are set aside.

In relation to the other cases, the disputants are still employees and working at the Respondent. The Tribunal cannot ignore the fact that reference has been made extensively in the terms of reference of the disputes to dates of joining the Respondent or years of service which are in dispute, to many acquired rights based on joining dates and years of service and even to alleged reduction of vacation leaves. These issues may certainly fall under terms and conditions of employment. After due consideration, the Tribunal finds that it would be premature (underlining is ours) for this Tribunal to rule that the remaining disputes as referred to it relate wholly or mainly to 'retirement pension'. In view of the manner in which the terms of reference have been drafted, the Tribunal cannot safely exclude, at this stage of the proceedings that the disputes relate, for example, mainly to years of service and may thus be heard by the Tribunal.

However, the Tribunal hastens to add that the jurisdiction of the Tribunal will be limited as highlighted in the cases of **Mr Hassen Soodhoo & others (above)**. The Tribunal will again refer to what was said in those cases:

"The terms of a VRS may, in an appropriate case, (underlining here is ours) be challenged before the Tribunal (as sought to be done here) but this will be achieved by way of a proper "dispute of interests". The manner in which each of the 24 workers is trying to challenge the terms of the VRS by invoking pressure/coercion prior to the signing of the option forms is not the proper way to proceed before the Tribunal and is outside the jurisdiction of the Tribunal."

It is apposite to note that a preliminary point was taken specifically in those cases as follows:

“The other obvious reason is that there exists between the Disputant and the Respondent a contractual obligation governed by the Civil Code which it is not possible to vary except by first cancelling the existing contract: an exercise for which the Tribunal has no jurisdiction.”

The Tribunal may also refer to the responsibility of an individual worker under Article 41 of the **Code of Practice (Fourth Schedule to the Act)** which provides as follows:

41. Every worker shall –

(a) satisfy himself that he understands the terms of his contract of employment and abide by them; and

(b) make himself familiar with any arrangements for dealing with grievances and other questions which may arise out of his contract of employment, and make use of them as and when the need arises

Also, the Tribunal wishes to refer to The Private Pension Schemes Act. The Private Pension Schemes Act deals with issues pertaining, among others, to pension schemes, accrued benefits, pension benefits, the pension scheme administrator, the employer and the beneficiary.

Section 29A of The Private Pension Schemes Act, for example, provides as follows:

29A. Conversion or shift

(1) No private pension scheme shall, without the approval of the Commission, alter its pension benefits by way of a conversion or shift.

(2) The conversion or shift of a private pension scheme shall be made in accordance with such guidelines as the Commission may issue.

(3) In this section –

“conversion” means the process of –

(a) converting the benefits of a member in a defined benefit scheme that have accrued up to the date of conversion; and

(b) crediting the commuted value to the individual account of the member under the subsequent defined contribution scheme;

“shift” means the process of shifting a member of a defined benefit scheme to a defined contribution scheme, for future service accrual, on the date on which the accrued pension benefits of the member under the defined benefit scheme are preserved.

At paragraph 22 of his Statement of Case, the Disputant averred the following:

22. The Disputant also avers that in the Year 2008, before migrating on contract, the Respondent Bank informed the Disputant, then and there, that he may transfer out the sum which has been contributed by the Bank in the DB Fund as at 2008 to any Pension Administrator of his choice. Same was transferred to SICOM. As a consequence thereof, upon the Disputant reaching the age of 60, SICOM proposed a lump sum of MUR 234,072 plus a Reduced Monthly Pension of MUR 4,877 to which the Disputant agreed [Doc I].

Section 54(2) of The Private Pension Schemes Act provides as follows:

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.

For the reasons given above, the Tribunal finds that the preliminary objection as taken (underlining is ours) under this limb for the remaining cases is premature and that the Tribunal will have to proceed to hear evidence on the merits before actually coming to any decision. The preliminary objection in law under the first limb that the actions of the remaining disputants fall outside the jurisdiction of the Tribunal is set aside at this stage of the proceedings.

Under the second limb of the preliminary objection, Counsel for the Respondent has raised the following objection in law:

the “dispute” is not a labour dispute as it does not fall within the definition of a labour dispute as provided in Section 2(c) of the Employment Relations Act 2008 (Act No.32 of 2008), which reads as follows:

“does not include a dispute that is reported more than 3 years after the act or omission that gave rise to the dispute”.

The Tribunal must first spell out the act or omission which triggered the remaining disputants’ labour disputes and then determine at what point in time such act or omission took place (**vide Ramyeed-Banymandhub D v The Employment Relations Tribunal 2018 SCJ 252**). In that case, the Supreme Court also stated the following:

“The respondent therefore failed to consider the possibility that the co-respondent’s alleged omission could have been continuous, thereby seriously affecting the whole basis of the Tribunal’s computations whilst determining the objections related to time limits.”

Some evidence has been adduced only on behalf of Mr Jankee in the first case of **Mr Yagieshwarnath Krishnadass Jankee And The SBM Bank (Mauritius) Ltd, ERT/RN 33/24**.

For ease of reference, the terms of reference of the dispute in the case of Mr Jankee is reproduced below:

I joined the bank in December 1982 and have worked for over 38 years; only at the SBM.

My dispute is that on 26.02.2018 the bank informed me, by way of a letter, that for administrative purposes my date of joining shall be in June 2016; as if I joined at age of 54 and only about 5 years ago. This looks more a cunning strategy and a colorable device than anything else. The denial reduced my vacation leaves rights by 18 days yearly for the next 8 years, up to retirement age. It also entitles the bank to shift my pension scheme from the SBM Defined Benefits to the relatively disadvantageous SBM Defined Contribution to which I strongly disagree.

Ex facie the terms of reference of the dispute, the dispute is that on 26 February 2018, the bank informed him by way of a letter (dated 26 February 2018) that his date of joining shall be June 2016 or more precisely “shall remain 06 June 2016” (as per Doc G annexed to the Statement of Case of Mr Jankee). This is the act which triggered the disputant’s dispute and this is clear from the terms of reference. In the terms of reference of the dispute in the case of Mr Jankee, there is also the following: “*This looks more a cunning strategy and a colorable device than anything else. The denial reduced my vacation leaves rights by 18 days yearly for the next 8 years, up to retirement age. (...)*”

Thus, as per the Disputant, there was an alleged injustice which was being caused to him over a continuous period of time. In the case of **Ramyead-Banymandhub D v The Employment Relations Tribunal (above)**, the Supreme Court went on to state the following:

The simplistic approach adopted by the Tribunal was further confirmed by the fact that it considered that since the averments set out in the applicant’s statement of case made reference to “the last decade” or “the last 13 years”, the time for the dispute arose in 2001. When read in their proper context however, these words connote that the applicant was referring to the injustice caused to her over a prolonged and continuous period, especially since these averments also mention that the co-respondent was “still refusing” to give consideration to her post and was “still causing” her prejudice as at the date of her statement of case i.e., on the 24th March 2015.

The respondent therefore failed to consider the possibility that the co-respondent’s alleged omission could have been continuous, thereby seriously affecting the whole basis of the Tribunal’s computations whilst determining the objections related to time limits.

In the case of Mr Jankee, the Tribunal cannot discard the possibility that the alleged omission of Respondent could have been continuous, at least, in relation to the issue of vacation leaves. Also, and very importantly, in relation to the other remaining cases (besides the case of Mr Jankee), the evidence adduced so far does not enable the Tribunal to even perform the first duty which is placed on it. Indeed, as per the Supreme Court judgment in the case of **Ramyead-Banymandhub D v The Employment Relations Tribunal (above)**, the Tribunal has to first spell out the act or omission which triggered the dispute of each of the remaining disputants and then to determine at which

point such act or omission took place. The terms of reference are different in each of the above said cases. It is impossible at this stage without hearing any evidence in relation to these cases for the Tribunal to identify conclusively in each and every case the act or omission which triggered the dispute/s. It would be unsafe at this stage of the proceedings for the Tribunal to find that any of the above remaining disputes is not a labour dispute. The preliminary objection taken under this limb is, at most, premature and is set aside at this stage of the proceedings. Subject to the observations made above including in relation to the powers of the Tribunal, the Tribunal will proceed with the hearing of the remaining disputes.

(SD) Indiren Sivaramen

Acting President

(SD) Anundraj Seethanna

Member

(SD) Chetanand K. Bundhoo

Member

(SD) Ghianeswar Gokhool

Member

11 October 2024