

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 141/23

Before

Indiren Sivaramen	Acting President
A. Parsooram Ramasawmy	Member
Kirsley E. Bagwan	Member
Divya Rani Deonanan	Member

In the matter of: -

Mrs Hansa Deepaul Gohin (Disputant)

And

St Helena College (Respondent)

In presence of: Private Secondary Education Authority (Co-Respondent)

The above case has 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 Disputant and Co-Respondent were assisted by Counsel whereas the Respondent was not assisted by Counsel. The terms of reference of the two disputes read as follows:

"1. Whether I should be confirmed on a full-time, permanent and pensionable basis by reason that I worked continuously without any break since 2020 as per the WRA."

"2. Whether my monthly salary as from December 2022 and Bonus should be withheld without any valid reason and prior notification thereby causing hardship to my livelihood."

The Tribunal proceeded to hear the case. The Disputant deposed and she solemnly affirmed that the contents of her Statement of Case were true. She stated that she was employed by Respondent as from February 2020. She was not aware of any authorization which would have been granted by the Co-Respondent for her to be employed only up to October 2020. She stated that she was not aware of the letter dated 23 May 2022 whereby Respondent would have allegedly informed Co-Respondent that her services would be required on a part-time basis for the academic year 2021-2022. She replied in the negative when her counsel asked her if from 2020 up to November 2022 the Respondent had ever told her that “*ki ou pou alle part-time*”, that is, that she would perform part-time work. She stated that when she completed one year of service, she thought that she had been confirmed in her post. She stated that she stopped receiving her salary in December 2022 and though she is still at the Respondent, she is not receiving her salary. She stated that she learnt about the issue of “part-time” in January 2023. A copy of a circular issued by the then Private Secondary Schools Authority dated 26 June 2014 was produced (Doc A).

In cross-examination, the Disputant stated that she was the only one teaching Performing Arts at the Respondent since 2020. She stated that she was employed by the college and that it was the Co-Respondent which paid her salary. She agreed that there was no direct contract between the Co-Respondent and herself and she would not be aware of any correspondence sent by the Co-Respondent to the Respondent.

The President of the Union of Private Secondary Education Employees (UPSEE) deposed before the Tribunal, and he stated that the union was assisting Disputant. He produced copies of letters sent by UPSEE (Docs B and C). In cross-examination, he stated that they had a consultation with the Manager of Respondent first and then sent the letters to the Co-Respondent. In cross-examination by Counsel for Co-Respondent, the deponent stated that the Co-Respondent is the regulatory body and that Private Secondary Schools receiving grants from the Government have to follow rules set by the Co-Respondent. He was aware of the amendment brought to the Education Act but stated that this was in 2022. In re-examination, he stated that the regulation came in December 2022 whilst the present matter concerned the period 2020/2021.

The Manager of Respondent deposed before the Tribunal, and he stated that he has to seek approval from the Co-Respondent before he can employ a teacher. He stated that it is only the Co-Respondent which can confirm whether the college can employ a teacher because it is a matter of ‘entitlement’. He stated that he can recommend but cannot decide whether to employ or not. He also stated that the Co-Respondent is the body which remunerates for the work being done so that, according to him, it is the Co-Respondent which indirectly employs the teachers.

In cross-examination, the Manager agreed that the Disputant never received any letter to the effect that she would be employed from February 2020 to October 2020. He also agreed that changing someone from full-time to part-time work amounts to a substantial change in the terms and conditions of employment of that person. He stated that he had no documentary evidence to show that the Disputant agreed to go part-time. He accepted that Disputant performed full-time duties and added that she was being paid as a full-time teacher. The Manager stated that the Disputant has always been an asset to the school and is a teacher whom the school would like to have as an employee. When questioned in relation to a letter dated 23 May 2022 which the Respondent had sent to inform the Co-Respondent that the services of Disputant would be required on a part-time basis for the academic year 2021-2022 from 14 June 2021 to 18 November 2022, the Manager stated the following:

“I was informed by the PSEA through the Supervisor that Mrs Gohin does not have the required qualifications to teach Performing Arts as a full-time teacher and at a certain time I was informed that she will have to be informed that she is longer an employee of St. Helena College. In good faith, I continued to negotiate with the PSEA because Mrs Gohin is a very capable, competent Educator whom we would like to have on establishment. Again, the PSEA through the Supervisor informed me that since Mrs Gohin did not have a full load of work on the time table, she would have to be declared a part-time teacher. So, it was either keeping her as a part-time teacher or doing away with her which we did not want to do. So, I remember having talked to Mrs Gohin though I have no written evidence that such issue had arisen and that we were asked by the PSEA through the Supervisor to declare her a part-time Teacher, though I concede again that I do not have any written evidence to sustain what I am saying. But I took the oath and I am saying the truth in all faith.

Declaring Mrs Gohin as a part-time Teacher was not done as a move to penalise her or to harm her in anyway. On the contrary, we did this move because we wanted Mrs Gohin to stay among our staff and instead of losing her completely, at least we had her on a part-time basis until hoping that in the coming years she would have a full load of work so that we can renew our request with the PSEA to consider favorably her employment as a full-time Teacher.”

The Manager agreed that in July 2023 he had informed the Co-Respondent in writing that he wanted Disputant to be on a full-time basis.

The Manager agreed that the Supervisor of the Co-Respondent had informed him that Disputant was not doing sufficient hours to be considered a full-time employee. He confirmed that further to his letter of 27 July 2023, the Co-Respondent replied that Disputant was going to be paid exceptionally on the Grade II Teacher (Personal) scale on a part-time basis as from January 2023 up to the end of third term 2023 to teach only

Performing Arts (dance). He agreed that he was also informed that the services of Disputant may be retained by Respondent each year between January up to end of third term, provided that she has a workload to teach Performing Arts and grants towards her salary will be paid on the Grade II Teacher (Personal) scale and this for a period of 5 years effective year 2024. Finally, he was informed by the Co-Respondent that Disputant may be employed on a permanent basis on request by the school provided that Disputant possesses the qualification requirements as laid down in the Education Regulations (as amended) and she falls within the 'School Teacher Entitlement'.

The Manager stated that since all the documents pertaining to the Disputant had been sent to the Co-Respondent and that the former was being remunerated as a full-time teacher, this, according to him, meant that Co-Respondent had approved her qualifications. He also suggested that he had written to the Co-Respondent to confirm that the Disputant had the qualification and that he had requested that the latter be employed on a full-time basis. He could not, however, remember when he allegedly sent this letter.

A Supervisor deposed on behalf of Co-Respondent, and he stated that he is the Supervisor for Respondent since the year 2020. He stated that with the amendment to the Education Act, the eligibility certificate is no longer considered. He, however, stated that the Disputant had such a certificate, and this authorized her to teach a few subjects including Dance, and she was considered as a Grade II Teacher. The Supervisor stated that Disputant was authorized to teach from 3 February 2020 up to the third term of the academic year 2020 because Performing Arts was a compulsory subject for lower grades and that there was no one else at the school to teach that subject. He stated that based on the workload that the Respondent submitted to him, it was determined that the Disputant should be on a part-time basis. The Supervisor suggested that the Disputant had not been on continuous service and that the latter had not worked for more than a year since 2020. He explained that there was always some sort of 'stop time' after every academic year. He also stated that the Disputant was above the entitlement of educators for the Respondent. He added that for the year 2023 the Disputant had not been paid by the Co-Respondent. The Supervisor, however, had some difficulty deposing when questioned in relation to Doc D and finally stated that a letter had been sent with conditions attached.

The Supervisor stated that he was aware that Disputant was paid a full-time salary from February 2020 to November 2022. He then stated that in fact there was a mistake by the Finance Section and that the Disputant was paid extra since the payment made to the latter should have stopped in March 2021. There was an excessive payment made to the Disputant according to him. The Supervisor stated that the payment to Disputant was stopped at the end of the academic year. He did not agree that the Disputant should have been confirmed in February 2021 and he stated that the latter was above the

'entitlement'. He did not agree when it was put to him that the Disputant had been working full-time on permanent establishment since she received her full-time salary up to November 2022. He agreed that he verbally requested the Manager of Respondent to consider Disputant as working part-time. He stated that he had to do so based on the workload produced by the Manager.

The Tribunal has examined all the evidence on record including the submissions of Counsel and statement made by the Manager of Respondent. It is apposite to note that even the terms of reference of the present dispute refer specifically to "as per the WRA", that is, "as per the Workers' Rights Act". Section 71 of the Employment Relations Act provides as follows:

71. Exclusion of jurisdiction of Tribunal

The Tribunal shall not enquire into any labour dispute where the dispute relates to any issue-

- (a) within the exclusive jurisdiction of the Industrial Court;*
- (b) which is the subject of pending proceedings before the Commission or any court of law.*

Section 3 of the Industrial Court Act reads as follows:

3. Establishment of Industrial Court

There shall be an Industrial Court with exclusive civil and criminal jurisdiction to try any matter arising out of the enactments set out in the First Schedule or of any regulations made under those enactments and with such other jurisdiction as may be conferred upon it by any other enactment.

The Workers' Rights Act 2019, in so far as it does not relate to section 69A, is included in the First Schedule to the Industrial Court Act. The Tribunal thus, by virtue of section 71 of the Act, shall not enquire into any labour dispute where the dispute relates to any issue arising out of the Workers' Rights Act (in so far as it does not relate to section 69A). The present matter has nothing to do with section 69A of the Workers' Rights Act (reinstatement of a worker following termination of his or her employment).

Also, as per the terms of reference and evidence adduced, the dispute is as to whether the Disputant should be confirmed on a "full-time" basis. It is apposite to note that section 14(5) of the Workers' Rights Act provides as follows:

14(5) Where a worker employed on a part-time contract considers that he should have been classified as a full-time worker, he may apply to the Court for an order to that effect.

The relevant Court would be the Industrial Court as per the Workers' Rights Act (and not the Tribunal).

Also, and very importantly, the Tribunal has jurisdiction to enquire into a labour dispute which has been referred to it under section 69(9) of the Act. 'Labour dispute' is defined in section 2 of the Act as:

"labour dispute" –

(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)

In this particular case, there is no dispute or disagreement (underlining is ours) between the Disputant and the Respondent (which is as per law the employer) in relation to any of the above. In fact, the Manager of Respondent confirmed that he had written to Co-Respondent to inform that he wanted Disputant to be on a full-time basis. He confirmed that Disputant was a teacher whom the Respondent would like to have as an employee.

The letters sent by the UPSEE (Docs B and C) to the Co-Respondent are telling. In Doc B, the Secretary of UPSEE wrote the following:

"7. The Union fails to understand this unilateral and irrational decision of the PSEA which is causing much hardship to Mrs Deerpaul.

8. In view of the above, the Union earnestly requests the PSEA to pay the salary of Mrs Deerpaul Gohin Hansa for the month of December 2022 along with her bonus in full as per Workers Right Act without any further delay."

The 'dispute' clearly is with the Co-Respondent and has more to do with issues such as 'School Teacher Entitlement', hours of work of Disputant to be considered as a full-time employee, or still qualifications of the Disputant.

Indeed in this case, there are further complications. The Disputant is relying on Doc A which, though emanating from the former Private Secondary Schools Authority, indicates

that the regulatory body (which is now the Co-Respondent) has to be informed as to whether a person may be confirmed in his or her post or otherwise. The evidence adduced before us suggests that it is the Co-Respondent which confirms or at least gives the green light to confirm a person. This was the version of the representative of Respondent before us and he stated that it is only the Co-Respondent which can confirm whether the college can employ a teacher or not. There is nothing on record to suggest that the Respondent may, on its own, confirm the Disputant be it on a full-time or part-time basis. The crux of the issue and thus the 'dispute' itself is certainly not between the Disputant as a worker and the Respondent as the employer. Indeed, the award which is being sought (under the first dispute) is addressed essentially at the Respondent. Any award as per the terms of reference would only be valid and binding if it can bind the Co-Respondent, which is the regulatory body under the Private Secondary Education Authority (PSEA) Act and the Authority which can confirm the Disputant in her post.

In the consolidated cases of **Mrs Marie Francine Sarangue & others And Rodrigues Educational Development Company Ltd, i.p.o Private Secondary Education Authority, ERT/RN 46-48/21**, the Tribunal stated the following:

"The unavoidable conclusion from the Statements of Case of the disputants is that the disputants are, in fact, seeking to challenge a decision of the Co-Respondent in relation to the Bachelor of Business Administration which was not or no longer being recognized by Co-Respondent for teaching purposes.

[...]

"Dispute" as per the ordinary dictionary meaning refers to disagreement or argument (Concise Oxford English Dictionary). Ex facie paragraph 16 (paragraph 15 in the case of Disputant No 3) of the Statements of Case of the disputants, there is no dispute between the disputants and the employer, that is, Respondent.

However, there is more to it. Indeed, the Tribunal only has jurisdiction as granted to it under the law, that is, under the Act. The Tribunal certainly has no powers to interfere with the execution of the powers of the Co-Respondent (which is not the employer) under the Private Secondary Education Authority (PSEA) Act. The Tribunal is not empowered to rule as to whether the Co-Respondent has exceeded its powers under the PSEA Act or on the reasonableness of rules, guidelines and directives made by Co-Respondent or standards and conditions set by the latter under the PSEA Act (underlining is ours). There is no suggestion in the Statements of Case of the disputants that the Respondent (the employer) alone has the power to upgrade the teaching licences of the disputants. To that extent, the Tribunal has no power to award or order that the teaching licences of the disputants, as Educators, should be upgraded.

The Tribunal takes note of the objects, functions and powers of the Co-Respondent under the PSEA Act including the responsibility of the Co-Respondent under section 4(f) of the PSEA Act for "the registration and inspection of secondary or pre-vocational schools, their managers, rectors and members of teaching and non-teaching staff." "Inspection" is defined at section 2 of the same

PSEA Act as including “pedagogical inspection and quality assurance”. In the case of **Dhurun v Private Secondary Schools Authority and Shibchurn 1991 MR 147**, the Supreme Court confirmed that the then Private Secondary Schools Authority (PSSA) was not the employer of a teacher who was in the employment of a secondary school. That case was in relation to an appeal from a decision of the Intermediate Court dismissing a claim which had been entered by Mr Dhurun, who was running a secondary school, against the PSSA in the presence of a teacher, Mr Shibchurn. The claim was for an amount, as part of the statutory grant payable by the PSSA and representing an increase in salary alleged to have been due to Mr Shibchurn, by reason of an enhancement in his qualifications. Though the Supreme Court referred in that case to “a claim for salary which Mr Shibchurn alone could have entered directly against the PSSA” by virtue of the statutory right conferred on him by section 16 of the Private Secondary Schools Authority Act (very similar to the corresponding section 16 in the current PSEA Act), there is nothing to suggest, even remotely, that a teacher or educator can report a ‘dispute’ against his employer, which is agreeable with the contention of the teacher/educator, to seek an award forcing the Private Secondary Education Authority (which may or may not be joined as a party to the case) to review his decision pertaining to objects, functions and powers of the Private Secondary Education Authority under the PSEA Act.

As properly suggested by Counsel for Respondent, other avenues were available to the disputants if they were not satisfied with the decision or standards set by the Co-Respondent. The Tribunal also bears in mind section 21B and 21C of the PSEA Act.”

The objects, functions and powers of the Co-Respondent are laid down in the PSEA Act. The Tribunal may here refer to the following provisions of the PSEA Act:

4. Objects of the Authority

The Authority shall be responsible for —

(a)...

(d) *ensuring that the terms and conditions of employment of staff, in secondary or pre-vocational schools comply with the relevant laws, rules, guidelines and directives;*

(e) *the payment of grants to secondary and pre-vocational schools and ensuring that the grants are being used for the intended purposes;*

(f) *the registration and inspection of secondary or pre-vocational schools, their managers, rectors and members of teaching and non-teaching staff.*

5. Functions of Authority

The Authority shall have such functions as may be necessary to effectively further its objects and shall, in particular –

(a) ...

(b) ...

(c) deal with matters relating to secondary and pre-vocational schools, their managers, rectors and members of teaching and non-teaching staff;

(d) formulate appropriate policies, make rules, issue guidelines and directives, and set standards and conditions –

(i) for promoting and enhancing quality education in secondary schools;

(ii)...

(e) undertake inspection and periodic quality audits in academic, infrastructural and other areas related to school management;

(f) ensure that secondary and pre-vocational schools are managed in accordance with relevant laws, rules, guidelines, directives and standards;

(g) ...

5A. Powers of Authority

(1) *The Authority –*

(a) shall have such powers as may be necessary to make rules, issue guidelines and directives, and set standards and conditions to enable it to effectively discharge its functions and take appropriate action to ensure that secondary and pre-vocational schools comply with the rules, guidelines, directives, standards and conditions; and

(b) ...

Section 16 of the PSEA Act provides as follows:

16 Emoluments to teachers

(1) *Notwithstanding section 15 [dealing with “Grants to secondary or pre-vocational schools”], the Authority shall deduct from the grant or provisional grant payable to a secondary or pre-vocational school, the aggregate amount of the emoluments payable by that school to its staff and, subject to subsection (2), shall pay such emoluments directly to the members of the staff concerned without incurring any liability to the secondary or pre-vocational school or any other person.*

(2) *No payment of emoluments shall be made to a member of the staff under subsection (1), unless the Authority is satisfied that the emoluments are due.*

- (3) *Where the emoluments of any member of the staff employed by a secondary or prevocational school are paid directly to him by the Authority, that member of the staff shall have no claim against the secondary or pre-vocational school in respect of his services for the month for which he has received his emoluments from the Authority.*
- (4) *Notwithstanding any other enactment, where the emoluments of a member of the staff are paid directly to him by the Authority —*
- (a) the Authority shall not be regarded as the employer of that person by reason of the payment of the emoluments to him;*
 - (b) the secondary or pre-vocational school shall always remain the employer of that person and shall, in relation to that person, be responsible for matters of promotion and supervision;*
 - (c) any amount overpaid to a member of the staff by the Authority shall be set off against any future emoluments payable to that person;*
 - (d) matters of discipline and dismissal of a member of the staff shall be within the jurisdiction of such board of discipline and dismissal as may be prescribed and on such terms and conditions as may be generally and specifically prescribed.*
- (5) *In this section, “member of the staff” means any member of the teaching and non-teaching staff of a secondary or pre-vocational school, other than the manager.*

The Tribunal also bears in mind sections 21A, 21B and even 21C of the PSEA Act.

The Education Act and the regulations made thereunder also provide, amongst others, for the qualifications required for registration as qualified teachers. The Tribunal will not proceed to consider in detail the requirements of the Education Act and regulations made thereunder, save to mention that these regulations besides providing for qualifications for qualified teachers also provide for the overall teacher to pupil ratio in every secondary school.

The Employment Relations Tribunal, which is an administrative tribunal cannot go against the above-mentioned regulations. Section 72(5) of the Act, very importantly, provides as follows:

72(5) An award under sections 56(5) and 70(1) shall not contain any provision inconsistent with any enactment, other than a Remuneration Regulations or Wages Regulations, relating to the terms or conditions of, or affecting, employment, and any such provision shall, to the extent of the inconsistency, be void.

More importantly, the Tribunal cannot make an award directed against the Co-Respondent (which is not the employer) and award that the Disputant should be confirmed.

In the present case, the Tribunal may only note the responsibility of Respondent as employer, and which had to provide the Disputant with the particulars of the work agreement. The present situation has been caused by a series of factors including the alleged overpayment made to the Disputant over a relatively long period of time. The Disputant, as a worker, also has responsibilities and as per the Code of Practice, every worker shall satisfy himself or herself that he or she understands the terms of his/her contract of employment and abide by them. The evidence suggests shortcomings on the part of all parties involved in the present matter (for example, the alleged overpayment over a relatively long period of time). In the present case, the Tribunal finds that the dispute is not a labour dispute and is thus not within the jurisdiction of the Tribunal. The Tribunal thus cannot make any award under the first dispute.

In any event, there is no evidence on record that there is indeed any relevant vacancy at the Respondent (and as per its 'entitlement') for any confirmation to be effective. For all the reasons given above, the first dispute is set aside.

As regards the second dispute, the Tribunal will again refer to section 16(2) and section 16(5) of the PSEA Act which are reproduced below for ease of reference:

16(2) No payment of emoluments shall be made to a member of the staff under subsection (1), unless the Authority is satisfied that the emoluments are due.

...

16(5) In this section, "member of the staff" means any member of the teaching and non-teaching staff of a secondary or pre-vocational school, other than the manager.

Section 15(8) of the PSEA reads as follows:

15(8) Notwithstanding any other enactment, where a secondary school fails to comply with –

- (a) this Act or any regulations made under this Act, or*
- (b) the Education Act or any regulations made under that Act;*
- (c) any condition imposed by the Authority,*

the Authority may withhold any grant (or part thereof) payable under this Act until the authority is satisfied that the school has complied with the relevant legislation or any condition imposed by the Authority.

The terms of reference are vague in that no precision is given as to who would have withheld the monthly salary and bonus of the Disputant as from the relevant period. However, from the evidence adduced and the relevant provisions of the law, here again an award is being sought against the Co-Respondent. The dispute is in fact between the Disputant and the Co-Respondent, and The Tribunal is not satisfied that this is a labour

dispute as defined in the Act. Also, the Tribunal cannot make any such award in the light of section 16(2) of the PSEA Act. The remedy of the Disputant, if applicable, would lie elsewhere and not before the Tribunal. For the reasons given above, the second dispute is also set aside.

(SD) Indiren Sivaramen

Acting President

(SD) A. Parsooram Ramasawmy

Member

(SD) Kirsley E. Bagwan

Member

(SD) Divya Rani Deonanan

Member

5 June 2024