

EMPLOYMENT RELATIONS TRIBUNAL

RULING

ERT/ RN 4/24

Before

Indiren Sivaramen	Acting President
Alain Hardy	Member
Kirsley E. Bagwan	Member
Muhammad N. Simrick	Member

In the matter of:-

Mr Mohamed Mossadek Roojee (Disputant)

And

Sanlam General Insurance Ltd (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 terms of reference of the point in dispute read as follows:

- “1. Whether I should have been drawing a basic salary that is at par with colleagues performing the same job.*
- 2. Whether my pension benefits should have been calculated on the retirement age of 63 instead of 60.*
- 3. Whether my pension benefits should be calculated on the basic salary that is at par with colleagues performing the same job.”*

Both parties were assisted by Counsel. At paragraph 6 of his statement of case, the Disputant avers that the terms of dispute that he is pursuing today is: *“whether I should have been paid a basic salary that is at par with colleagues performing the same job.”* At paragraph 7 of the same statement of case, Disputant states that he is dropping the terms

of dispute dealing with the issue of his pension. The second and third points in dispute have thus been withdrawn by the Disputant.

The Respondent has taken a plea in limine litis which reads as follows:

In limine litis

The claim of the Disputant is time-barred and should be set aside with costs.

The Tribunal proceeded to hear arguments from both counsel on the plea in limine litis taken on behalf of Respondent. Under the first limb of his arguments, Counsel for Respondent argued that the present dispute does not amount to a labour dispute since it has been reported more than three years after the act or omission that gave rise to the dispute. Under the second limb of his arguments, he argued that at any rate the claim or the greatest part of the claim is time barred under Article 2279 of the Civil Code. Counsel for Respondent referred to paragraphs 2 and 3 of the Statement of Case of Disputant which read as follows:

2) I was appointed as Superintendent effective as from 1 July 2008. My salary at that time was Rs 17,200. I also perceived a conveyance allowance of Rs 4,000 per month.

3) I have been made aware that a colleague of mine, namely one [X - name edited], who was also appointed in the same post of Superintendent effective as from 1 July 2008, was at the time given a basic salary of Rs. 20,000 and a conveyance allowance of Rs. 5,000 per month.

Counsel suggested that paragraph 4 of the same Statement of Case has no bearing on the timeline since it does not qualify paragraph 3 of the Statement of Case. Paragraph 4 of the same Statement of Case reads as follows:

On 6 July 2020, after I have retired and come to fully ascertain what had happened, including by obtaining documentary evidence. I wrote to the Director at the Ministry of Labour urging him to intervene. However, despite several meetings at the level of the Ministry, and reassurances that this matter would be resolved, nothing happened.

Counsel for Respondent argued that there is no element of knowledge, that is, when someone would have become aware of something, in the definition of 'labour dispute'. He suggested that the act or omission which gave rise to the dispute is the alleged short payment effective as from 1 July 2008. He suggested that the 'act' started on 1 July 2008 though he conceded that the Disputant will argue that this was a 'continuous' act. Counsel for Respondent did not agree that it is important to hear what the Disputant has to say since he argued that both parties are bound by their pleadings. He argued that the Disputant had not qualified in his pleadings when he became aware of the alleged

discrepancy. He referred to two rulings delivered by the Tribunal and moved that the present action be set aside.

Under the second limb of his arguments, Counsel for Respondent relied on Article 2279 of the Civil Code and he argued that since salary is paid on a monthly period, “this” is prescribed by three years. He referred to judgments of the Supreme Court in relation to the application of Article 2279 of the Civil Code. Counsel for Respondent argued that since the dispute was reported to the President of the Commission for Conciliation and Mediation on 30 May 2023 (as per the letter of referral of the dispute), going backwards three years would be 30 May 2020. Since the Disputant avers that he took his retirement on 30 June 2020, Counsel for Respondent suggested that the only live issue in the present dispute would be for the month of June 2020. He stated that this was only if the Tribunal did not accept the first limb of his arguments.

Counsel for Disputant argued that based on the same arguments of Counsel for Respondent, the Tribunal would not be able to read more than is in the Statement of Case of Disputant, that is, read a date prior to the retirement of Disputant as being when he became aware of the alleged discrepancy in salaries. He suggested that paragraph 4 of the Statement of Case of Disputant as drafted is enough to allow the Disputant to come and adduce evidence. He noted that for the purposes of the present arguments, everything that is stated in the Statement of Case of Disputant is deemed to be accepted.

Counsel for Disputant also referred to a judgment of the Judicial Committee of the Privy Council in the case of **Toumany and anor v Veerasamy [2012] UKPC 13** where the Courts of Mauritius have been encouraged to be less technical and more flexible in their approach to jurisdictional issues. Counsel for Disputant highlighted that contrary to Courts of Law, the Tribunal has the power, as per law, to conduct its proceedings in a manner it deems appropriate in order to determine any matter before it fairly and promptly and may deal with the substantial merits of such matter with a minimum of legal formalities. Counsel suggested that this goes against the argument of Counsel for Respondent that the Disputant has to stand and fall strictly by whatever is stated in his Statement of Case. He added that the Respondent is asking the Tribunal to make a conclusive determination on the basis of suppositions and on how one is to read into the Statement of Case of Disputant without hearing any evidence at all. He suggested that this was something which the Tribunal could not do.

Counsel for Disputant also argued that this is a case where there is a ‘continuing’ breach. He stated that the Disputant was being paid his salary every month and that according to the Disputant, he was being discriminated against every time he was being paid a lesser salary than a colleague doing the same job as him. According to counsel, every month there was a breach so that there was a ‘continuous’ breach. Counsel also tried to draw a distinction between a disputant who would have sat on his rights and not taken action,

and the Disputant who would not have been aware that a colleague of his who was doing the same job as him would have been paid more than him. In relation to the second limb of the objection of the Respondent, Counsel for Disputant argued that the judgments referred to by Counsel for Respondent referred to debts that were liquidated, due and demandable, that is, “*des créances qui sont établies*”. He argued that this was not the case here, and that there is no “*créance*” which is due and demandable. The principle for any right had to be determined and established first.

The Tribunal has examined the arguments of both Counsel. For the sake of the arguments on the point taken in *limine litis*, the averments made by Disputant in his Statement of Case are deemed to be admitted. The Disputant is averring in his Statement of Case that he would have been paid as from 1 July 2008 a salary which was different from the salary paid to a colleague allegedly performing the same job as him. Counsel for Disputant argued that there was a ‘continuing breach’ in this case since the Disputant was every month paid his salary until he was paid his last salary when he retired on 30 June 2020. Counsel for Disputant argued that the Disputant was thus allegedly discriminated against every month until he retired on 30 June 2020.

In the case of **D. Ramyeed-Banymandhub v The Employment Relations Tribunal 2018 SCJ 252**, the Supreme Court dealt with the same part (c) of the definition of “labour dispute” under section 2 of the Act. The Supreme Court stated 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.”

The Tribunal thus has to consider the possibility that the Respondent’s alleged act or omission could have been continuous. In the light of the nature of the dispute as per the Statement of Case of Disputant and the averments made therein, the Tribunal cannot, at this stage of the proceedings, safely discard the possibility that the alleged act or omission of the Respondent was a continuous one.

As per the referral from the Commission for Conciliation and Mediation, the present dispute was reported to the President of the Commission on 30 May 2023. It is averred in the statement of case of Disputant (and deemed accepted for the purposes of the present arguments) that Disputant retired on 30 June 2020. Salary is considered a recurring payment and is paid on a monthly basis. On the basis of the Supreme Court judgment in the case of **D. Ramyeed-Banymandhub (supra)**, the Tribunal cannot outright discard the possibility that there was a continuous act or omission that led to the present dispute. At least for the salary for the month of June 2020, the Disputant would then be considered to be 'within delay'.

The Tribunal finds that the first limb of the arguments of Counsel for Respondent is at best premature and that some evidence will have to be heard before the Tribunal can determine whether or not the dispute (the first point in dispute is the only dispute left before the Tribunal) is a labour dispute as defined under section 2 of the Act. The first limb of the arguments thus cannot stand at this stage and is set aside.

Under the second limb of his arguments, Counsel for Respondent relied on Article 2279 of the Civil Code which reads as follows:

Article 2279: Les arrérages des rentes perpétuelles et viagères; ceux des pensions alimentaires;

les loyers des maisons, et le prix de ferme des biens ruraux;

les intérêts des sommes prêtées, et généralement tout ce qui est payable par année, ou à des termes périodiques plus courts, se prescrivent par trois ans.

Salary is paid monthly and any claim for unpaid salary or for the balance of unpaid salary will be governed by Article 2279 of the Code Civil. However, in the present case there is no claim for unpaid salary which was due and demandable. The present dispute is a "revendication salariale" and the Disputant has first to establish a right to what he is claiming. He must establish before the Tribunal that he was entitled, as he claims, to a higher salary than he was paid. It is only if the Tribunal awards that the Disputant should have drawn a higher salary during the relevant period that the latter will be entitled to same. Such an award of the Tribunal besides being binding on the parties, would then create "une créance" which is liquidated, due and demandable. It is only from then that the "prescription de trois ans" would start running. The only limitation period in relation to a "revendication salariale" before the Tribunal would be the limitation period provided for under part (c) of the definition of "labour dispute" in section 2 of the Act.

For the reasons given above, the second limb of the plea in limine cannot stand and is set aside. The Tribunal will thus proceed to hear the case on its merits.

(SD) Indiren Sivaramen
Acting President

(SD) Alain Hardy
Member

(SD) Kirsley E. Bagwan
Member

(SD) Muhammad N. Simrick
Member

12 June 2024