

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 83/2022

Before: -

Shameer Janhangeer	-	Vice-President
Christelle P. D’Avrincourt (Mrs)-		Member
Ghianeswar Gokhool	-	Member

In the matter of: -

Ms. Edlyn Riane BABAJEE

Disputant

and

N. SADDUL COLLEGE

Respondent

In presence of: -

PRIVATE SECONDARY EDUCATION AUTHORITY

Co-Respondent

The present matter has been referred to the Tribunal for arbitration pursuant to *section 69 (9)(b)* of the *Employment Relations Act* (the “*Act*”) by the Commission for Conciliation and Mediation (“*CCM*”). The Terms of Reference of the dispute read as follows:

Whether I should be confirmed as an Educator with continuity of service as from 11 August 2014.

All parties were assisted by Counsel. Mr D. Dodin appeared for the Disputant, whereas Mr S. Servansing appeared for the Respondent and Mr D. Dangeot, Principal State Counsel appeared for the Co-Respondent together with Mrs S. Hajee Abdoula, Senior State Counsel instructed by Mr D. K.

Manikaran, Principal State Attorney. All three parties have submitted their respective Statement of Case in relation to the dispute.

THE DISPUTANT'S STATEMENT OF CASE

The Disputant took up employment as an Educator with the Respondent by virtue of a contract dated 11 August 2014 effective as from the same day. The contract notably states that the Disputant is being offered an appointment initially on a temporary contractual basis from 11 August 2014 to the last day of 2nd term 2015 and that her eventual confirmation will depend mostly on her performance and other factors elaborated during a meeting on 8 August 2014 with the Ag. Rector and the Manager. In early November 2018, the Disputant complained to Rose Hill Labour Office regarding delays in payment of her remuneration. By letter dated 12 November 2018, she was informed by the Respondent that her services as replacee teacher will no longer be required as from 6 December 2018. This was four years after her appointment. She objected to her termination of employment by letter dated 21 November 2018 addressed to the Ministry of Labour and various meetings were held at the Port Louis Labour Office, where it was agreed that, pending the resolution of the issues raised, she would resume work on first day of term in January 2019.

By letter dated 11 January 2019, she was offered temporary appointment as Facilitator (Extended Programme) effective as from 10 January 2019. The Disputant, by letter dated 6 February 2019, informed management that she was not accepting the offer and that her resumption of duty, in January 2019, was a continuity of employment as Educator. There was a deadlock between the parties with no settlement of the issues raised by her with management. She then reported a dispute at the CCM on 3 June 2019. At meetings before the CCM, the Respondent made her eligible to increments and benefits from the pension scheme as from February 2021. Despite best endeavours, a solution could not be reached and a deadlock was declared on 19 September 2022. The dispute has now been referred to the Tribunal.

It has been averred that there has been continuity of employment as Educator since she took up employment on 11 August 2014 by virtue of the contract of employment signed on the same day. The Respondent cannot be heard to say that the Disputant was employed on a temporary basis to replace Mrs Rajeshree Babajee as a replacee teacher for French language as the contract provides that her appointment was initially on a temporary contractual basis as Educator and the fact that she has been acting as Educator for over four years; the contract provided for her eventual confirmation and there have been no issues with in her performance raised by the Respondent; she has consistently been employed on the same terms and conditions as her initial contract of employment,

which has been tacitly renewed since 2015 with tacit renewal not being expressly excluded in the said contract; her employment was not restricted to teaching French and she has also been teaching Art; she was informed that two Educators were recruited to teach French in May 2016 and June 2016, with the former being confirmed in November 2017; she had been on probation for a maximum of 12 months and was entitled to be appointed upon the vacancy for Educator arising based on the Co-Respondent's rules; and she was also entitled to be confirmed to her post within the delay prescribed by the Co-Respondent.

THE RESPONDENT'S AMENDED STATEMENT OF CASE

The Respondent has notably averred that the Disputant was recruited, on 11 August 2014, as Educator on a temporary contractual basis in replacement of Mrs Rajeshree Babajee, holder of the post of Educator in a substantive capacity, whose application for leave without pay from 9 February 2014 to 30 September 2018 was approved. The Disputant was aware that all material times she would be replacing Mrs R. Babajee during the whole period of her approved leave. The Co-Respondent is the sole paying agent for remuneration of staff of private secondary schools and the Respondent cannot be held responsible for delays in payment.

On 11 August 2014, the Disputant was offered employment as Temporary Educator until the end of the second term of 2015 with a one-month termination notice. On 10 September 2014, the Co-Respondent approved the appointment of Disputant as Temporary Educator. On 15 January 2015, the Disputant's temporary employment was extended to 31 December 2016, then subsequently to the end of the first term of 2017, then up to 30 September 2018 and finally up to 6 December 2018. On 10 January 2019, the Disputant was offered temporary employment as Facilitator (Grade 7) for a one-year period which she accepted under protest.

It has also been averred that the Respondent is the employer of its staff, including the Disputant, with a proviso that all the terms and conditions of employment, including recruitment, promotion, discipline and termination, rests with the Pay Research Bureau ("PRB") and the Co-Respondent. The Co-Respondent enjoys very wide powers of supervision and decision in the management of private schools under the *Private Secondary Schools Authority Act 1976 (Act No. 20 of 1976)*. The Disputant is aware she was recruited to replace Mrs R. Babajee and, to that extent, her employment was temporary.

The Respondent has in good faith offered Disputant the post of Facilitator on a temporary basis, which carries the same salary as Educator, inasmuch as Mrs R. Babajee has resumed duty on 1 October 2018. Action was initiated for the Disputant's appointment on a permanent basis since June 2019 and the Co-Respondent's approval was obtained on 4 February 2021 with effect from 16 November 2020. The Disputant's claim that she is in continuous employment as an Educator is untenable in law. The Respondent has no power to appoint the Disputant as Educator or Facilitator, either temporary or permanent, without the Co-Respondent's approval.

THE CO-RESPONDENT'S AMENDED STATEMENT OF DEFENCE

The Co-Respondent has raised a preliminary objection *in limine litis* as follows:

Co-Respondent moves that the dispute be set aside on the following grounds:

- (a) the Tribunal does not have jurisdiction to entertain the point in dispute as it is time barred and thus does not tantamount to a labour dispute as defined in section 2 of the Employment Relations Act;*
- (b) ex-facie the Terms of Reference by which the Disputant is bound, the Disputant is seeking an award of a declaratory nature.*

On the merits of the dispute, the Co-Respondent has notably averred that the Respondent's Manager submitted an application for authority to employ the Disputant for the period 11 August 2014 to end of second term 2015 in replacement of one Mrs R. Babajee who had proceeded on leave without pay from 11 August 2014 to 30 September 2018. The Co-Respondent started paying grants towards the Disputant's salary with effect 11 August 2014. The authority to employ the Disputant was extended firstly up to December 2015, secondly up to 31 December 2016, thirdly for academic year 2017 and fourthly up to end of the first term of 2018. As per their records, for the period the Disputant was replacing the teacher who proceeded on leave without pay, the school was required to submit the Disputant's return of absences on a monthly basis and she was not eligible to join the SICOM pension scheme. However, since she is on the permanent establishment at the school, she has been receiving her salary on pay day and joined the pension scheme on 6 November 2020.

It has further been averred that as per their records, the Disputant was considered as having been recruited to replace the teacher who proceeded on leave without pay; by letter dated 1 November 2018 from the Respondent, provisional authority was sought to employ the Disputant up to 5 December 2018 and beyond as she had been assigned the duties of Facilitator (Extended Stream)

following the implementation of the Nine-Year Basic Education; by letter dated 8 November 2018, they were requested to exceptionally pay grants towards the Disputant's salary up to 5 December 2018; and on 5 December 2018, the Respondent requested their approval to recruit the Disputant as Facilitator as from 10 January 2019 and by letter 9 January 2019, the request was acceded to. Following a request made by the Respondent, they, by letter dated 4 February 2021, informed the former that they had no objection to continue paying grants towards the Disputant's salary and that her date of confirmation is 16 November 2020.

THE EVIDENCE OF WITNESSES

The Disputant, Mrs Edlyn Riane Babajee, was called to adduce evidence on her behalf. She stated that she started to work at the college on 11 August 2014 and signed a contract for the duration of a year and, at the end of this period, if the college was satisfied with her services, she would be considered for employment for an indeterminate period. She produced the contract of employment dated 11 August 2014 (Document A). She had trouble with the payment of her salary. She produced a letter dated 4 October 2018 addressed to the Respondent's Manager (Document B) concerning the pension scheme. She made a complaint to the Rose Hill Labour Office in November 2018 regarding her unpaid salaries. She was sent a letter dated 12 November 2018 (produced as Document C) regarding her employment as teacher which she received after having complained to the Labour Office. As per the letter, her services as replacee teacher were no longer required and she was confused as when employed, it was never as a replacee teacher. She then addressed a letter dated 21 November 2018 (produced as Document D) to the Ministry of Labour, which decided that she must resume her job in the first term which started on 10 January 2019. The college gave her a letter dated 11 January 2019 (produced as Document E) offering her a new job as Facilitator with a trial period starting on 10 January 2019. She replied by letter dated 6 February 2019 (produced as Document F) to the Respondent's Manager. Therein, she stated that she does not accept the offer and she considers her employment to be continuous since August 2014. No agreement was found and she reported the matter to the CCM.

The Disputant also stated that her employment must be counted as from 11 August 2014 as when she took up employment, she accepted to be on a trial period for the first year. She has invested herself in the job and was told that she was a replacee. She has worked continuously from 11 August 2014 to today. She never received any correspondence from 11 August 2014 to 12 November 2018 saying that she is not permanent, there are problems with her probation or there are problems with her performance. She does not agree with the Respondent's stand that she was employed as a replacee teacher for Mrs Babajee. Apart from French, she has also taught Art. The Respondent did recruit two French teachers in 2016; one of them, Mrs Koosul having been confirmed after a year and

the other, Mr Descha has left. She is being caused prejudice as she will have nearly 10 years' service and it makes a difference regarding the pension plan. There are also advantages regarding increase in salary and leaves which the other teachers at the college benefit from. She asks to be confirmed in her employment as from 11 August 2014.

The Disputant was questioned by Counsel for the Respondent. She notably stated that her contract of employment states she was recruited as Educator on a temporary contractual basis. It was stated that she would be on probation and her performance would be monitored. She agreed that when she signed, all her documents would be submitted to the Co-Respondent which is the procedure when recruiting. She was aware that Mrs Rajshree Babajee was on leave. She was not informed that on 30 September 2018, she had to leave for the other Mrs Babajee to resume. She was not aware that the contract was being renewed every time it was being renewed. There were delays in payment of her salary and she was paid later. She was never given a new contract and only has one contract of employment.

Referring to the letter dated 12 November 2018 (Document C), it is the first time she becomes aware she was recruited as a replacee teacher. She had problems with her salary, her pension was not being deducted; she enquired verbally and was told the necessary would be done. Despite the letters she wrote, nothing was done. The Private Secondary Education Authority ("PSEA") told her to see with the college. She was not aware that she was employed as replacee of Mrs Rajshree Babajee and was paid irregularly because of the breaks between the different contracts as she thought there was an administrative issue. She is not aware what went on between the PSEA and the college and was not informed that the former had approved her employment with the college. She is not aware of the dates of renewal of her contract. She agreed that the college as an employer does not have full powers. She is now employed as Facilitator since 16 November 2020 permanently and indeterminately and draws the same benefits as an Educator. She has always wanted her employment to be confirmed as from 2014.

The Disputant was also questioned by Principal State Counsel for the Co-Respondent. She notably stated that since she was employed in 2014 to 2018, she never contributed towards a pension plan. She was never told she was a replacee when she asked. She agreed she was not in a permanent position at the college. She agreed that when she left her job on 5 December 2018 and resumed employment on 10 January 2019, there was a break of more than 28 days. Her position is no longer Educator but Facilitator as from 10 January 2019. She agreed that more than three years have passed since when the issue arose till when she reported her dispute to the CCM on 16 July 2019. Referring to her contract dated 11 August 2014, where it is mentioned in a temporary capacity, and that she should have come forward saying there is a problem, she stated that she thought she had to wait.

The Disputant stated that she did not understand when it is being said she took more than three years as she went to the Labour Office and she was not aware that there is a period of three years. She went to the Labour Office to settle the matter of the payment of her salary beginning November 2018. The matter of continuity of employment before the Tribunal comes after. She did go the PSEA, who told her to see with the college if she is a replacee or not. She produced a letter from the PSEA dated 21 November 2018 (Document G). She agreed that at the level of the Co-Respondent, she was in a position of replacee from 2014 to 2018 as her employer had asked for the PSEA to renew its authority for her to work in a temporary capacity.

Mr Chadrakant Toolsee, Manager of N. Saddul College, was called to depose on behalf of the Respondent. He joined the college on 1 August 2016. The Disputant was replacing Mrs Rajshree Babajee. The Disputant had a contract from 19 January 2016 which was extended to 31 December 2016. They have to ask for renewal of all replacee teachers from the PSEA at the beginning of all academic years. This was done in 2016, 2017 and last time in early 2018. He does not recall if the Disputant enquired from him about her status when she has been working there. He did not send her any letter of confirmation for her post of teacher. She had to vacate the post in 2018 as the incumbent was back and a post of Facilitator was offered to her following meetings at the Labour Office. He stated that she was a replacee teacher as per her file when asked if he was aware that the Disputant was not aware that she was replacing Mrs Babajee.

Mr Toolsee also stated that the Disputant made a complaint when her employment was terminated in 2018 at the Labour Office referring to the letter of complaint dated 21 November 2018 (Document D). The approval of the PSEA must be sought prior to submitting her name for registration. The college had applied for approval to the PSEA for approval of the replacement. The Disputant accepted the post of Facilitator, resumed duty and continued to work. She was finally appointed on a permanent basis from November 2022 as Facilitator and is still holding the post. This post was introduced when the Government decided to introduce the extended stream in all schools. Facilitators have the same scale as Educators and have a slightly lower work load. An appointment follows a vacancy, there was no vacancy on 11 August 2014 and it is clear that the Disputant was a replacee. She cannot be appointed in a permanent capacity being a replacee teacher.

Mr Toolsee was questioned by Counsel for the Disputant. He notably stated that the contract of employment (Document A) was drafted by the college. The appointment was initially on a temporary basis and at some point, there would be an eventual confirmation based on some factors. According to the document, the temporary nature of the contract would give way to an appointment

in a substantive capacity. The confirmation in a substantive capacity would have occurred no later than August 2015 subject to the existence of vacancy, though nothing has been said about this in the contract. There is no document which shows the non-confirmation of the Disputant and there is no confirmation letter. A one-year temporary employment has spanned over four and a half years. He is not aware if the college carried out an assessment of the Disputant's performance in order to confirm her in employment as stated in the contract. He cannot show any document where there has been an issue with the Disputant's performance across the years.

Regarding the offer of employment as Facilitator (Document E), Mr Toolsee stated that the post was accepted under protest; it contains a clause whereby the Disputant would be appointed in a substantive capacity upon evaluation of performance, which should have taken place before the expiry of the one year. The Rector did carry out an evaluation and there was never an issue on performance. Mrs Rajshree Babajee resumed in October 2018 and the Disputant's Facilitator contract was only renewed on 9 January 2020. He agreed that there is no document from the college as employer informing the Disputant that she was a replacee teacher. He is not aware of the letter dated 6 February 2019 (Document F). He could not recall if one Educator was recruited to teach French in May 2016 as he joined on 1 August 2016; or for the other Educator recruited to teach French in June 2016. Mrs Koosool is the Educator French as at now but he cannot recall when she joined. If Disputant had been confirmed in a substantive capacity, she would have been entitled to more benefits than in a temporary position.

Mr Toolsee was also questioned by Principal State Counsel for the Co-Respondent. He notably stated that an appointment can only be offered subject to a vacancy. The Disputant was working on a temporary contractual basis until September 2018. The college remains the employer and the PSEA as a facilitator to oversee the management of the institution. The delays in payment of salary should be attributed to the PSEA. He agreed that the decision to select someone to be employed or not rests with the college and not with the PSEA. During the period 5 December 2018 to 10 January 2019, there was no continuity of service, there was a break. When re-examined by his Counsel, Mr Toolsee notably stated that the contract has to comply with the rules and regulations of the PSEA and if it is against these rules, it cannot stand. The only condition which may give rise to an employment is a vacancy. During his tenure in office, the Disputant did not apply nor was interviewed for any post of Educator.

Mr Vishwakumar Santraj Kesso, Administrative Assistant, was called to depose on behalf of the Co-Respondent. He affirmed as to the correctness of the Co-Respondent's Amended Statement of Defence. Once they received the request from the college, they see to it that the Educator proceeding on leave without pay, whether the application is in order; once the application has been

approved, they proceed with the approval of the replacee. N. Saddul College is the Disputant's employer and the PSEA pays grants towards the Disputant's salary. The first contract (Document A) was up to the last date of the second term of 2015 and it has been continuously renewed up to 30 September 2018. He produced a letter dated 10 September 2014 from the PSEA addressed to the Manager of the college (Document H); a second letter dated 19 October 2015 from the PSEA to the Respondent's Manager (Document I); a letter dated 19 January 2016 from the PSEA to the Respondent's Manager (Document J); a letter dated 18 February 2016 from the PSEA to the Respondent's Manager (Document K); a letter dated 16 December 2016 from the PSEA (Document L) informing the Manager that they would pay grants for the Disputant up to end of first term 2017; a letter dated 17 April 2017 (Document M) informing the Manager that they will be paying grants towards Disputant's salary up to 31 December 2017; a letter dated 19 February 2018 (Document N) that they will pay Disputant up to 31 March 2018; and a letter dated 4 April 2018 (Document O) informing the Manager that they will pay Disputant up to 30 September 2018, the end date of when Mrs R. Babajee was on leave without pay.

Mr Kesso also stated that as per the correspondences exchanged, the Disputant's status was that she was on a temporary basis. He produced the covering letter from the Manager dated 11 August 2014 (Document P) but the letter does not say the Disputant is in a temporary capacity. The contract was attached to the application. Document A was attached to the authority to employ and Document P was the letter of offer for the PSEA. When someone is employed in a temporary capacity, she is not entitled to contribution towards the SICOM pension and would be entitled upon confirmation. The contract between the Disputant and Respondent was extended until 2018 as a replacee teacher. They received a letter dated 5 December 2018 (produced as Document Q) from the Respondent's Manager requesting authority to employ the Disputant as Facilitator as from 10 January 2019. Facilitator is not a post, the post is Educator; the Educator is assigned special duties as Facilitator. They gave approval by letter dated 9 January 2019 (produced as Document R). The PSEA acts upon the recommendation of the Respondent and they approve subject that they satisfy the criteria. The Disputant is now confirmed as Educator on a permanent basis since November 2020. She has been granted three additional increments following her confirmation as she worked four years as a replacee.

Mr Kesso was questioned by Counsel for the Disputant. He notably stated that the contract of employment is between the college and the Disputant; and the PSEA has nothing to do with the contract. The letter dated 11 August 2014 (Document P) is the application made by the college to employ the Disputant. The letter sent by the PSEA does not mention that the Disputant is employed in a temporary capacity. There is no letter from the Respondent where the Disputant is being informed that she is being employed as replacee teacher. The contract of employment (Document A) does not mention that the Disputant is being employed in replacement of another Educator but

mentions on a temporary contractual basis. The issue of pension only arises upon confirmation. The contract does speak of confirmation and it contains a clause as to joining the pension scheme. There was no break in payment of grants during the period 11 August 2014 to 30 September 2018. Had the Disputant been confirmed as Educator, she would have been entitled to benefits she did not have as replacee teacher.

The Co-Respondent's Representative was also questioned by Counsel for the Respondent. He notably stated that the payment of grants is one of the objects of the PSEA. The fourth object is to ensure that terms and conditions of staff in secondary schools comply with the relevant rules, guidelines and directives. The terms and conditions of service in private secondary schools are regulated by the PRB Report. The terms and conditions in the contract of employment must comply with the law and regulations, otherwise they would be null and void. They are not aware of correspondences between the Manager and the employee; but the PSEA approved payment of grants in replacement of the Educator on leave without pay. As a SICOM pension was not being offered to the Disputant, it shows that she was not confirmed and was not permanent. When re-examined, Mr Kesso stated that the letter (Document P) from the college stated that Disputant was recruited in replacement of another Educator. The Disputant could have known that she was in replacement or in a temporary capacity when she applied for vacation leave which was not approved.

THE PRELIMINARY OBJECTION IN LAW

The Co-Respondent has raised a preliminary objection *in limine litis* as follows in its Amended Statement of Defence:

Co-Respondent moves that the dispute be set aside on the following grounds:

- (a) the Tribunal does not have jurisdiction to entertain the point in dispute as it is time barred and thus does not tantamount to a labour dispute as defined in section 2 of the Employment Relations Act;*
- (a) ex-facie the Terms of Reference by which the Disputant is bound, the Disputant is seeking an award of a declaratory nature.*

In relation the first limb of the plea *in limine litis* raised, Principal State Counsel for the Co-Respondent has notably submitted that the issue of confirmation of the Disputant arose in 2014 and the matter was reported to the CCM on 16 July 2019, the three-year period having lapsed. The Disputant was well aware of her situation as when cross-examined by Principal State Counsel, she

admitted that she had not contributed to any pension scheme and agreed that someone in her position who has not been contributing to a pension scheme cannot be said to be in a permanent position at the college. It is submitted that the three-year limitation period had already expired after year 2015 as there was no contribution made on her behalf to any pension scheme.

It should also be noted that Principal State Counsel has sought to distinguish the matter of *Ramyead-Banymandhub v The Employment Relations Tribunal* [2018 SCJ 252] from the present case in submitting that the act or omission that has triggered the Disputant's right of action would be when she was employed on a temporary capacity by virtue of a contract of employment dated 11 August 2014. Referring to *Ramma and New Mauritius Hotels Ltd* (ERT/RN 19/2018), it was submitted that the word "continuity of service" in the Terms of Reference cannot at any rate amount to be in continuous employment for the period in dispute. In support of the point that the act in dispute is not a continuous act, reference has been made to *Adaya and Mauritius Ports Authority* (ERT/RN 114/18). It was further submitted that relying on the averments made by the Disputant in her Statement of Case, the required act or omission should be taken as one year after the date the Disputant signed her contract with the Respondent on 11 August 2014. Thus, the dispute falls foul of the definition of a labour dispute under *subparagraph (c)* under *section 2* of the *Act*. It should be noted that as per its written submissions, the Respondent has joined in the motion and submissions of the Co-Respondent on the issue of time bar.

Regarding the second limb of the plea *in limine litis*, it was submitted on behalf of the Co-Respondent that *ex facie* the Terms of Reference, the Disputant is seeking an award of a declaratory nature and the Tribunal does not make awards of a declaratory nature (*vide Mooneepen and The Mauritius Institute of Training and Development* (ERT/RN 35/12); *Johar and Cargo Handling Corporation Ltd* (ERT/RN 93/12); *Khednee and National Transport Corporation* (ERT/RN 52/14); and *Nunkoo and Beach Authority* (ERT/RN 121/17). The Tribunal delivers awards which are binding on the parties. In support, reference has been made to the cases of *Baccus & Ors. v The Permanent Arbitration Tribunal* [1986 MR 272] and *Air Mauritius Ltd v Employment Relations Tribunal* [2016 SCJ 103]. It has also been submitted that the prayer of the Disputant at paragraph (C)(1) is in relation to whether her salary should have been in line with the Pay Research Bureau, which is contrary to *section 3* of the *Workers' Rights Act* ("WRA") and not in line with the Terms of Reference of the dispute from the CCM. It can be noted that the Respondent has not submitted in relation to this limb of the preliminary objection raised by the Co-Respondent.

On the other hand, in relation to the first limb of the plea *in limine litis*, Counsel for the Disputant has notably submitted that the issue deals with the confirmation of the Disputant as Educator in a permanent position with continuity of employment since 11 August 2014. As per her

Statement of Case, her continuity of employment was stopped when she received the letter dated 12 November 2018 informing her that her services were no longer required as replacee teacher. This is the act which gives rise to the labour dispute that breached her continuity of employment and does not recognise her as an Educator. The CCM being seized of the labour dispute on 3 June 2019, the dispute is well within the prescriptive period of three years.

The Disputant's Counsel also submitted that there is another way of looking at the labour dispute concerning the continuity of her employment. The omission of the Respondent to consider the Disputant as an Educator on the permanent establishment with continuity of employment since 11 August 2014 is a continuous omission forming part of a continuous dispute. The issue of continuous dispute was validated in *Ramyead-Banymandhub (supra)*.

Regarding the second limb of the preliminary objection, it has been submitted by Counsel for the Disputant that upon a matter being referred, the Tribunal has the duty to enquire into the dispute and make an award thereon in accordance with *section 70 (1)* of the Act citing *Air Mauritius Ltd v Employment Relations Tribunal (supra)*. Following an analysis of various cases before the Tribunal, it was submitted that an award, which can be binding on the parties and be an implied term of the contract of employment, will not be in the nature of a declaratory award. The Terms of Reference of the dispute can be binding on the parties and be an implied term of the Disputant's contract of employment. The Disputant is still in employment with the Respondent and the issue of her job position as Educator and her continuity of service are live issues, which are practical.

Under the first limb of the preliminary objection raised by the Co-Respondent, it is being contended that the Tribunal does not have jurisdiction to entertain the dispute as it is time barred and does not amount to a labour dispute as defined in *section 2* of the Act. The Co-Respondent is therefore relying on this particular provision of the law, which provides as follows:

2. Interpretation

...

"labour dispute" –

...

(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 following can be noted from what was stated in the relation to the time bar under *section 2* of the Act by the Supreme Court in *Ramyead-Banymandhub (supra)*:

Whilst considering the nature of the objections raised by the co-respondent, the Tribunal was therefore first called upon to spell out the act or omission which triggered the applicant's labour dispute and to then determine at what point in time such act or omission took place. This is in line with the provisions of article 2271 of the Code Civil which provides as follows:

"Le délai de prescription court à compter du jour où le droit d'action a pris naissance."

It would therefore be incumbent on the Tribunal to identify the act or omission which has given rise to the labour dispute; and to ascertain at what point in time the act or omission took place. The Tribunal is also aware that it is bound to enquire into the substance of the objection within the limits of its Terms of Reference as may be noted from the decision in *Ramyead-Banymandhub (supra)*:

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

The Terms of the Reference of the dispute is asking the Tribunal to determine whether the Disputant should be confirmed as Educator with continuity of service as from 11 August 2014. The evidence has revealed that there has been an omission by the Respondent to confirm the Disputant as Educator since she has been employed at the college in August 2014. It should be recalled that when employed by the Respondent she was given a contract dated 11 August 2014 (Document A). From a perusal of this contract, she was offered appointment initially on a temporary contractual basis as Educator from 11 August 2014 to the last day of 2nd term 2015. The contract also stated that her eventual confirmation will depend mostly on her performance and on other factors elaborated during a meeting on 8 August 2014 with the Acting Rector and the Respondent's Manager. It has not been disputed that the Disputant's contract was tacitly renewed until 12 November 2018 when she received a letter stating that her services were no longer required as replacee teacher.

The omission which has given rise to the dispute is therefore the Respondent's failure to confirm the Disputant as Educator. It should be noted that in submissions, the Disputant did mention the omission of the Respondent to consider the Disputant as Educator as another way of looking at the labour dispute. The other contention of the Disputant is that her continuity of employment was stopped when she received the letter dated 12 November 2018 (Document C) informing that her services were no longer required as replacee teacher. The Tribunal does not, however, agree that this should be the act giving rise to the dispute inasmuch as per the Terms of Reference, the Disputant is

first of all seeking to be confirmed as Educator as from 11 August 2014 and the evidence has revealed that she was very well aware that she was not employed in a permanent position at the college despite not being informed that she was a replacee teacher. Although the Disputant claims that her continuity of employment was breached by the letter dated 12 November 2018, it has not been disputed that she was not still confirmed as Educator by the time she received the said letter.

It is now incumbent on the Tribunal to ascertain at what point in time did the omission of the Respondent to confirm the Disputant as Educator arise. From the contract (Document A), her eventual confirmation depended mostly on her performance and on other factors elaborated during a meeting on 8 August 2014 with the Acting Rector and the Respondent's Manager. Moreover, as per her evidence, the Disputant notably stated that she signed the contract for the duration of a year and, at the end of this period, if the college was satisfied with her services, she would be considered for employment for an indeterminate period. It should also be noted that, when questioned by Counsel for the Co-Respondent, she agreed that more than three years have passed since when the issue arose till when she reported the dispute to the CCM on 16 July 2019. She also stated that she thought that she had to wait when she was referred to her contract mentioning in a temporary capacity. She moreover agreed that she was not in permanent position at the college.

Therefore, it is clear that the contract dated 11 August 2014 was for the duration of a year, and as per the Disputant's own evidence, she should have been considered for employment permanently at the end of the contract if the college was satisfied with her services. It can also be noted that the Respondent's Manager notably stated that confirmation in a substantive capacity would have occurred no later than August 2015 subject to the existence of a vacancy, though this is not mentioned in the contract. He also stated that there is no document showing that there has been any issue with the Disputant's performance across the years.

It can therefore reasonably be concluded that the Disputant's confirmation as Educator should have occurred in August 2015 and the confirmation should normally have taken effect from the date she joined on 11 August 2014. Thus, the Respondent's omission to confirm the Disputant as Educator in August 2015 is the point in time at which the dispute arises. Having considered that the dispute was reported to the CCM on 16 July 2019, same has clearly been reported more than three years after the omission that gave rise to the dispute.

Counsel for the Disputant has also put forward the argument, in submissions, that the Respondent's omission is continuous forming part of a continuous dispute. It was notably submitted that the concept of a continuous dispute was validated in *Ramyead-Banymandhub (supra)*. Although,

in the aforesaid matter, it was held that the Tribunal had failed to consider the possibility that the employer's alleged omission could be continuous, the Supreme Court notably had the following to say:

The Tribunal therefore appears to have been inexplicably selective when it considered the purport of its terms of reference, especially with regard to the words "or otherwise", since the ruling does not indicate why the Tribunal chose to favour 2001 as the point at which time would have started running whilst clearly ignoring the words "or otherwise". In the absence of the Tribunal's line of reasoning on that issue, we must conclude that it incorrectly equated the year on which the applicant was assigned to her current post with the year on which the dispute would have arisen.

The Terms of Reference, in aforementioned decision, mentioned the words 'or otherwise' in relation to the date 2001. However, it can clearly be noted from the Terms of Reference of the present dispute that these specific words have not been used. Moreover, as per the Disputant's evidence, she has not stated that the dispute is continuous nor has this been averred in her Statement of Case. It should also be noted that the context in which the Supreme Court found that the dispute was continuous in *Ramyead-Banymandhub (supra)* cannot be automatically imported to the distinct facts of the present matter.

The Disputant has, moreover, admitted that she thought that she had to wait to come and say there was a problem when it was put to her, by the Co-Respondent's Counsel, that the contract mentioned in a temporary capacity. She also agreed that she was not in a permanent position. This clearly shows that the Disputant has slept on her rights in not coming forward and thinking that she had to wait regarding her confirmation as Educator.

The Tribunal can only therefore find that the present dispute has been reported to the CCM, on 16 July 2019, more than three years after the Respondent's omission to confirm the Disputant as Educator, which she claims should be with continuity of employment. The Tribunal cannot therefore find the present dispute would amount to a labour dispute pursuant to *subparagraph (c)* of the definition of a labour dispute under *section 2* of the *Act* and upholds the first limb of the preliminary objection raised by the Co-Respondent.

The Co-Respondent has also raised a preliminary objection to the effect that the Disputant is seeking an award of a declaratory nature *ex facie* the Terms of Reference. Although the Tribunal has upheld the first limb of the preliminary objection, it shall, for the sake of completeness, also address this issue.

It is trite law that once a matter has been referred to the Tribunal, the Tribunal has a duty to enquire into same and give its award. Indeed, this has been amply stated in the matter of *Air Mauritius Ltd v Employment Relations Tribunal (supra)*:

Under section 70 (1) the Tribunal is required to enquire into the substance of the dispute that is referred to it and to make an award thereon and it is not empowered to enquire into any new matter that is not within the terms of reference of the dispute.

It must, however, be noted that the Tribunal cannot be precluded from enquiring into a preliminary objection raised before it as noted above in *Ramyeed-Banymandhub (supra)*. Likewise, the following was held in *Davasgaium & Ors v Employment Relations Tribunal [2022 SCJ 342]*:

... the tribunal could not be precluded from adjudicating on the preliminary objection raised before it since it had the duty to enquire into the substance of the arguments, so that it was perfectly in order for the tribunal to determine whether the particular dispute referred to it fell under the definition of a “labour dispute” under the Act before it considered the merits of the dispute.

As per the evidence adduced in the present matter, the Disputant clearly stated that she is being caused prejudice as she would have nearly ten years’ service and it makes a difference regarding her pension. She would also have other advantages which other teachers have benefitted from. It may also be noted that the Respondent’s representative did state that if the Disputant had been confirmed, she would have been entitled to more benefits than in a temporary position. The Co-Respondent’s representative also confirmed that the Disputant would have been entitled to benefits she did not have as a replacee teacher had she been confirmed. It is therefore clear that in seeking to be confirmed with continuity of service, the Disputant is fighting for her legal rights and thus the dispute cannot be said to be academic as far as she is concerned.

Although the Co-Respondent is contending that *ex facie* the Term of Reference that the Disputant is seeking an award of a declaratory nature, it should be noted that as per the evidence adduced, the dispute does concern live issues. The Tribunal cannot therefore find any merit in the second limb of the preliminary objection raised and same is set aside.

Having found that the first limb of the preliminary objection raised by the Co-Respondent must succeed, the Tribunal therefore sets aside the dispute.

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

.....
(SD) Christelle P. D'Avrincourt (Mrs)
(Member)

.....
(SD) Ghianeswar Gokhool
(Member)

Date: 26th September 2024