

EMPLOYMENT RELATIONS TRIBUNAL

RULING

ERT/RN 90/2023

Before:

Shameer Janhangeer	-	Vice-President
Greetanand Beelato	-	Member
Cheetanand K. Bundhoo	-	Member
Divya Rani Deonanan (Mrs)	-	Member

In the matter of:

Mrs Mala Ramkalam

Disputant

and

District Council of Grand Port

Respondent

In presence of:

The Local Government Service Commission

Co-Respondent

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

Whether Mrs Mala Ramkalam should alternatively have drawn her pension on her reaching the age of 50.

All the parties have each submitted their respective Statement of Case in the present matter. The Tribunal has *proprio motu* raised a preliminary objection in law relating to its jurisdiction. The objection raised is whether the dispute amounts to a labour dispute. The matter was therefore argued on the preliminary objection raised. The parties were each assisted by Counsel.

Mr I. V. Coosha for the Disputant notably submitted that the Tribunal has raised the objection that pension is not a labour dispute. Referring the definition of a labour dispute under *section 2* of the *Act*, it includes wages and terms and conditions of employment. Under part *(b)*, remuneration and allowance cannot amount to a labour dispute. Reference was also made to the Pay Research Bureau (“PRB”) Report 2008, particularly paragraph 1.36 thereof headed ‘*Pension Reforms*’ which introduced the Defined Benefits (DB) Pension Scheme and this new pension scheme is a condition of service. Referring to paragraph 1.37, he stated that the Basic Retirement Pension Scheme is not a condition of service and also referred to paragraph 1.38 of the PRB Report 2008. As per these three paragraphs, pension is a condition of service and is the same as a condition of employment. Conditions of service in the public sector are governed by the PRB Reports which after Government approval become conditions of employment in the public service.

Counsel for the Disputant also referred to *Parliamentary Debate No. 30 of 19.08.2008* and what was stated by the then Minister of Labour in parliament in submitting that the Workfare Programme does not apply to public sector employees as their conditions of employment are governed by the PRB Report. Reference has also been made to paragraph 7.33 of the PRB Report 2008. It was also submitted that the Tribunal never stated that pension is not a labour dispute nor was same stated by the Supreme Court in the judgment of *Davasgaium & Ors. v Employment Relations Tribunal* [2022 SCJ 342] and the Court, during the judicial review proceedings, even considered the merits of the case. He did however acknowledge that the point was not taken in that case. Counsel also referred to matters before the Tribunal where the labour dispute was regarding pensions and the Tribunal never stated that pension is not a labour dispute. Counsel also made a request for the Attorney General to intervene in the matter under *section 98* of the *Act* if same was still unclear.

Mr S. Ramsagur for the Respondent in reply notably referred to a ruling of the Tribunal in the matter of *Ramlugun and Air Mauritius Ltd (ERT/RN 34/2023)* where it was considered that pension is not a labour dispute. The definition of a labour dispute does not mention pension and the term ‘*emoluments*’ does not include pension as per the *Workers’ Rights Act*. It was submitted that pension does not form part of the conditions of employment which is under the Tribunal’s jurisdiction. Counsel also referred to the cases quoted in the aforesaid ruling of the Tribunal on pensions. He

deferred with conditions of service being conditions of employment. A pension is received by the employee after the agreement reached its limit or at the date upon retirement. The Disputant has already resigned from the service and is not a worker, not an employee.

Mrs P. Autar-Callichurn, Ag. Senior State Counsel, appearing for the Co-Respondent stated that she concurred with the submissions of her friend for the Respondent and relied on the ruling in *Ramlugun and Air Mauritius Ltd* (supra). It is clear that the Disputant resigned from the local government on 1 November 2020 and is no longer an employee. It was submitted that the Tribunal has no jurisdiction to hear this matter.

The preliminary objection raised by the Tribunal is with regard to whether the present matter amounts to a labour dispute. It is trite law that the Tribunal is empowered to enquire into a labour dispute that is referred to it under *section 69 (9)* of the *Act* or referred voluntarily by the parties pursuant to *section 63* of the *Act*. The Tribunal can only enquire into a labour dispute as is defined under *section 2* of the *Act*, the relevant part of which reads:

“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;*

The Tribunal must be therefore satisfied that the dispute before it is a labour dispute as defined in the *Act* before it embarks into an enquiry into the merits of the dispute. In this context, the following can be noted from what was held in *Davasgaium & Ors. v Employment Relations Tribunal* [supra]:

... 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.

According to the Terms of Reference of the present matter, the Tribunal is being asked to enquire into whether the Disputant should alternatively have drawn her pension on her reaching the age of 50. Thus, the subject matter of the dispute concerns the Disputant’s pension. As per the Disputant’s Statement of Case, she is a former employee and has retired from her post of Senior Inspector of Works at the District Council of Grand Port ‘*on ground of marriage as per PRB 15.14.2*’

since October 2020. The Disputant has also notably averred that she is entitled to a reduced monthly pension and prays for a determination by the Tribunal as per the Terms of Reference.

As per the recent decision in *Missy & Anor V The State of Mauritius & Ors* [2024 SCJ 71], it is trite law that the averments in the plaint are deemed to be admitted for the purposes of determining whether there is any merit in a plea *in limine* (*vide Rama v Vacoas Transport Co. Ltd* [1958 MR 184]).

The term '*pension*' has been succinctly explained by the Supreme Court in the matter of *Tyack v Air Mauritius Ltd & anor* [2010 SCJ 257] as follows:

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.

From a plain reading of the definition of a labour dispute under the Act, it is clear that the item '*pension*' is not to be found therein. Counsel for the Disputant has therefore mainly argued that pension is a condition of service relying on extracts of the PRB Report 2008 and has equated conditions of service to be conditions of employment to bring the present dispute within the meaning of a labour dispute.

Although it has not been disputed that pension is a condition of service as described in the PRB Report 2008, the Tribunal notes that Counsel for the Disputant has not put in any authorities in support of his submission that a condition of service is a condition of employment. This particular submission is not therefore conclusive in itself. The Tribunal thus has to ascertain whether pensions fall under terms and conditions of employment pursuant to the definition of a labour dispute under *section 2* of the Act.

It would be apposite to note what was held in *Lesage v Mauritius Commercial Bank Ltd & anor*. [2004 MR 63]:

The accrued rights under the pension scheme may be regarded as rights separate from those which flow from the employment relationship and which are excisable or can be removed in specific circumstances. Pension entitlements are

*regarded as deferred remuneration from work that has already been carried out: see **Barber v Guardian Royal Exchange Society [1990] ICR 616.***

...

*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.)

It has thus been clearly established that pensions are independent of the contract of employment. It would not therefore be appropriate to classify pensions as terms and conditions of employment as pensions rights are deemed to be separate from the employment relationship. It should also be noted that the Disputant was informed by the Respondent on 30 October 2020 that the State Insurance Company of Mauritius (SICOM) would be liaising directly with her regarding her retiring benefits (*vide* Annex E to the Disputant's Statement of Case). A Statement of Benefits for the Disputant from SICOM for the District Council of Grand Port Pension Fund is also enclosed with the Disputant's Statement of Case (*vide* Annex F of same). This shows that the retirement benefits accruing to the Disputant are catered by SICOM who manages the Respondent's pension scheme and not by the Respondent itself.

It should also be noted that an award becomes an implied term of the contract of employment between the worker and the employer to whom the award applies (*vide section 72 (1)(e)* of the Act). As the Disputant, being a former worker, has retired from service and is no longer in employment, any eventual award, if in her favour, cannot possibly become an implied term of her contract of employment which is no longer in existence. Thus, the Tribunal cannot find that pensions amount to terms and conditions of employment under the definition of a labour dispute despite the arguments put forward by Counsel for the Disputant.

Counsel for the Disputant has also submitted that the Tribunal never stated that pension is not a labour dispute in the case of *Davasgaium & Ors. v Employment Relations Tribunal [supra]* despite the labour dispute being about pension. Counsel did however recognise that the point was

not raised in that matter. Reference was also made to other cases concerning pensions which have been entertained by the Tribunal.

It is well known that each matter is to be decided on its own merits. What occurs in other cases cannot be imputed to the present case where a preliminary objection has been expressly raised as to whether the dispute amounts to a labour dispute. Moreover, it has not been shown that in the other cases referred to by Counsel for the Disputant whether the issue of pensions amounting to a labour dispute was raised and adjudicated upon by the Tribunal.

Likewise, as submitted by Counsel for the Respondent, the Tribunal did consider the issue of pensions being a labour dispute in the matter of *Ramlugun and Air Mauritius Ltd (supra)*. It can also be noted that in an appeal before the Tribunal in *S. Wong Tong Chung and Commission for Conciliation and Mediation (ERT/RN 11/18)* against the rejection of a labour dispute by the President of the CCM, the decision to reject a dispute reported on the matter of pensions was upheld.

Regarding Counsel for the Disputant's submission for the Attorney-General to intervene in the matter if same was still unclear, it must be reminded that for the Attorney-General to intervene in a matter before the Tribunal, it must appear to him that some question of public importance or affecting the public interest is at issue. It cannot also be overlooked that the Co-Respondent was assisted by an Ag. Senior State Counsel from the Attorney-General's Office, who argued that the matter is not with the Tribunal's jurisdiction.

Having notably considered whether pensions amount to terms and conditions of employment and despite the matter of pensions having been heard in other cases, the Tribunal cannot find that pensions fall under the definition of a labour dispute pursuant to the preliminary objection raised *proprio motu* in the present matter.

The present dispute is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

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SD Greetanand Beelattoo
(Member)

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SD Cheetanand K. Bundhoo
(Member)

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SD Divya Rani Deonanan (Mrs)
(Member)

Date: 1st April 2024