PERMANENT ARBITRATION TRIBUNAL

RULING

RN 683

BEFORE

Rashid Hossen	**-**	**Acting President**
R. Gayan	**-**	**Member**
S. C. Chan Wan Thuen	**-**	**Member**

In the matter of :-

Telecommunications Workers Union

And

Cellplus Mobile Communications Ltd

This is a compulsory Arbitration referred by the Minister responsible for industrial dispute by virtue of section 82(1)f of the Industrial Relations Act 1973, as amended.

The point in dispute is :

"***Whether as a general rule salaries and monetary benefit provided by any Collective Agreement between the Cellplus Mobile Communications Ltd and the Union should be applied to all employees who were in the employment of the Cellplus Mobile Communications Ltd during the period covered by the Collective Agreement notwithstanding the fact they they have retired or otherwise been pensioned off before the date of the signing of the agreement".***

Counsel for the Respondent raised a point as to the jurisdiction of the Tribunal in view of a Supreme Court judgment in the matter of the Minister of Labour and Industrial Relations & Employment v/s The Permanent Arbitration Tribunal, in the presence of Mr. Serret and OS SCJ 169 of 2004.

Counsel submitted that in the case of Max Serret and Others before the Permanent Arbitration Tribunal an award was made. In the case of Max Serret and the Minister of Labour in presence of the Barclays Bank the appellants had declared the following industrial dispute –

"*Whether the pension paid to an ex-employee by Barclays Bank PLC under his contract of employment with the Bank, should be increased by the full rate of inflation after that employee had retired from employment and this in line with inflation rate payable yearly to the working staff. And whether the thirteenth month pension paid to that ex-employee should be calculated on the basis of 12 months or otherwise 10% of his yearly pension benefits in line with the thirteenth months payable to the working staff, and , thirdly whether the bank should maintain the contracted benefit of "per-rate on foreign currency" which was unilaterally cancelled by the Bank and thereafter without notifying."*

The Minister had rejected the report of industrial dispute and the short issue which had to be determined by the Tribunal was whether appellants who had already retired could declare an industrial dispute in relation to the contract of employment under which they work or on any matter connected with their retirement benefits. The Tribunal, after referring to the Trade Union and Labour Relations Consolidation Act of 1992, under the definition of trade dispute, and after referring to the definition of trade dispute under the Industrial Relations Act, came to the conclusion that workers who have retired may declare an industrial dispute in relation to the contract under which they worked. That was the finding of the Tribunal. There was an appeal to the Supreme Court and an application for judicial review.

There was a judicial review by the Minister of Labour and Industrial Relations & Employment against the decision of the Arbitration Tribunal and the Supreme Court, after having referred to the definition of Industrial dispute in the Industrial Relations Act, came to the conclusion, that it is quite clear from such definition and as rightly submitted by Learned Counsel for Applicant, the Industrial dispute for the purposes of the Act can only refer to a dispute between a current employer and his present employees, emphasis is on the word present employees, not former ones who had been in retirement as is the case with the corespondents. They decided that for these reasons, they should quash the decision of the Tribunal as being erroneous in law. If we look at the statements of case in the present matter, we find that the Union contends in paragraphs 6 and 7; first, it is contended that all employees in post as at July 1998 would be paid arrears as per right. In addition to the above fundamental claim the Union put forward the fact that for pensioners salaries are backdated. The backdating principle should also cover persons injured at work or otherwise unjustifiably dismissed for payment of severance allowance, or where contracts of employment have been terminated by the employer, with the agreement of employees or otherwise.

It is further submitted that basically what the Union is asking, if people have retired, if people have been dismissed from employment, then notwithstanding those matters that they should be paid the new salary structure. The position of Cellplus on this is quite clear. Employees are remunerated for what they have contracted to work. In the case of pensioners, they would benefit from an adjustment according to particular terms which applied to them but as yet Cellplus has no pensioners. But in the case of dismissed employees whose employment has been terminated for misconduct, the question of adjusting their severance allowance does not arise and Cellplus also adopts the position that once an employee resigns from employment, that employee voluntarily and unilaterally severs all contractual relationship with the employer and the contract of employment cannot be

revived in order to claim retroactively for any increase of salary. The Supreme Court, in the case of the Minister of Labour says precisely this, that an industrial dispute is only one which relates to a dispute between a current employer and his present employees, not former employees and emphasis is on the word former. One cannot simply look at the heading and the parties. One have to look at the substance of the case which is before the Tribunal and when the substance is considered one finds that there is no foundation in it, in as much as what is being sought is a ruling or a determination in respect of employees who have retired or otherwise been pensioned off. These employees cannot be the subject matter of an industrial dispute, either directly in their own name, as in the case of Serret or indirectly by shielding behind the Union and letting the Union runs the show.

The Applicant argued that this dispute has not been declared by any former employee. It has been declared by the union. The dispute does not refer to any former employee by name. The terms of reference of the dispute, is ***"Whether as a general rule"***. It is a matter of principle that the Union is arguing here, whether as a general rule employees who have retired can benefit or otherwise can they benefit from a Collective Agreement which was signed after these people left employment but which had effect while these people were still in employment. This is the dispute of the union. It is declared by the union. It is not on behalf anybody. It is a general principle agreed that the union is asking the Tribunal to find upon.

Counsel added that this dispute could also have been framed as an application for an interpretation of agreement. The Tribunal has this power under Section 88 of the Industrial Relations Act, it can interpret a collective agreement made between parties. This dispute appears to be along the line of an interpretation. In any event, it is an industrial dispute, because it concerns wholly a collective agreement and as the definition of an industrial dispute as

being a dispute between employee or trade union of employers, of employees and of an employer or a trade union of employers which relates wholly or mainly to a contract of employment or a procedure agreement. A collective agreement is to find the meaning of procedure agreement, so this dispute which exists between the union and management is an industrial dispute which relates wholly to a collective agreement.

The Applicant further argued that the dispute here is one of application. The Union wants to know whether a collective agreement has been signed to all employees who were in post on the effective date of that collective agreement, do they benefit from there. It is not retired employees or past employees who are declaring a dispute. They are not seeking shelter behind the union. It is the union itself who came forward with this dispute and as such there is authority to suggest that those employees can benefit from collective agreement which is signed whilst they were in employment and in support of that.

Counsel cited the case of Deep river Beau Champ and Phoenix 1985 MR204 as one example. In that case, a remuneration order was made with retro effective effect and it was held that the employee must benefit from the retroactive benefits they have obtained even though they have stopped work before the law is passed. There is a copy of Bowers and Employment Law 1990 edition which talks of backdated awards. In England, as well, there appears to be some controversies in surrounding this but the courts have held that employees who have left after an award has effect or to benefit from that award until the date they left. The issue before the Tribunal here is whether this is an industrial dispute and can the union declare a dispute? It is the union which declared a dispute. Nobody is hidden behind the union. It is the Union who is asking the Tribunal to decide this dispute, whether these people can benefit or not. But no specific name, no person has been put forward as an ultimate beneficiary. In any event, the award of Max Serret and others can be

differentiated between the case here. The Supreme Court in Max Serret held that former employees who had been in retirement for a long time cannot declare a dispute.

We wish firstly to deal with the point regarding Section 88 of the IRA 1973 as amended. This section reads as follows:-

"Interpretation of order, award and agreement

(1) Where any question arises as to-

(a) the interpretation of any order or award made by the Tribunal;

(b) any order or award being inconsistent with any enactment; or

(c) the interpretation of any collective agreement, any party to whom the order, award or agreement relates, or the Minister, may apply to the Tribunal for a declaration on the question, and thereupon the Tribunal shall make a declaration on the question after hearing the parties concerned.

(2) A declaration by the Tribunal under subsection (1) shall be notified to the parties and shall be deemed to form part of the order, award or collective agreement.

(3) Notwithstanding subsection (1), where a question arises out of any clerical mistake, incidental error or omission, the Tribunal may, on its own motion and without hearing the parties, make a declaration to rectify the mistake, error or omission."

The present matter is a referral of a dispute by virtue of Section 82 (1) (f) of the Act which provides:

"Consideration of report by Minister

(1) Where an industrial dispute has been reported to the Minister under Section 79, and the report has not been rejected by the Minister under section

80 or, where it has been rejected, the rejection has been revoked on an appeal to the Tribunal under section 81, the Minister may, with a view to promoting a settlement of the dispute -

(a) make proposals to the parties for the settlement of the dispute;
(b) recommend that the parties make use or further use of any machinery for the voluntary settlement of disputes available to them;
(c) refer the parties to the Commission for conciliation;
(d) cause the Commission to make an investigation into the dispute;
(e) advise the parties to refer the dispute to the Tribunal; or
(f) subject to subsection (2), refer the dispute to the Tribunal.

(2) The Minister shall not refer a dispute to the Tribunal-
(a) within 14 days of the day on which the Minister received the report of the dispute under section 79; or
(b) where the parties are endeavouring to reach agreement, before the expiry of such longer period of time as the parties jointly declare they require for the settlement of the dispute."

It is clearly not an application made under Section 88 and we fail to see how the Tribunal can be invited to frame the present referral of a dispute as an application for an interpretation of agreement.

We further disagree with the submission that the dispute is not being declared by the employees but by the Union and therefore the case of Serret (Supra) has no application here. It is immaterial that the dispute is brought by Union, certainly representing the employees, "since the issue that has to be determined in the present case goes to the jurisdiction of the respondent". (See Serret (Supra)). What is material is that the industrial dispute which "can

only refer to a dispute between a current employer and his present employees". (See Serret (Supra)).

The facts in Cowan v/s Pullman Spring Filled Co. Ltd (1967) 2 ITR 650, differ considerably to the present matter. In fact the particular applicant in that case was not entitled to the benefit of an award since he was not employed on the starting date. At any rate, the history of our industrial law has not followed England to the dot. We will only revert to French or English Law if the issue has not been decided by our Mauritian Courts. Serret (Supra) confirms that only current employees who can declare a dispute. In that context, the case of Deep River Beau Champ Ltd v/s Felix MR 1985 P 204-208 does not have any application regarding the present matter.

The Terms of Reference sent by the Minister refer to employees who were in the employment and they cannot be the subject matter of a dispute.

The Tribunal therefore rules that it has no jurisdiction to hear the present matter. It is accordingly set aside.

R. Hossen
Acting President

R. Gayan
Member

S.C. Chan Wan Thuen
Member

8th December 2004