

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 25/18 to ERT/RN 31/18

Before

Indiren Sivaramen	Vice-President
Abdool Kader Lotun	Member
Karen K. Veerapen	Member
Ghianeswar Gokhool	Member

In the matter of:-

Mr Santaram Ramma (Disputant No 1)

And

Mauritius Institute of Training and Development (Respondent)

Mr Sooriadev Boodhun (Disputant No 2)

And

Mauritius Institute of Training and Development (Respondent)

Mr Premduth Booputh (Disputant No 3)

And

Mauritius Institute of Training and Development (Respondent)

Mr Mario Rassou (Disputant No 4)

And

Mauritius Institute of Training and Development (Respondent)

Mr Goranah Junninth Kaniah (Disputant No 5)

And

Mauritius Institute of Training and Development (Respondent)

Mr Robin Sunyasi (Disputant No 6)

And

Mauritius Institute of Training and Development (Respondent)

Mr Navindeo Gobin (Disputant No 7)

And

Mauritius Institute of Training and Development (Respondent)

**I.P.O: (1) Ministry of Education, Tertiary Education, Science and Technology
(Co-Respondent No 1)**

**(2) Ministry of Public Service, Administrative and Institutional Reforms
(Co-Respondent No 2)**

(3) Pay Research Bureau (Co-Respondent No 3)

**(4) State Insurance Company of Mauritius (SICOM) (Co-Respondent
No 4)**

(5) Ministry of Labour, Human Resource Development and Training

The above cases have been referred to the Tribunal by the Commission for Conciliation and Mediation under the then Section 69(7) (prior to the coming into force of the

Employment Relations (Amendment) Act 2019) of the Employment Relations Act (hereinafter referred to as “the Act”). All the cases were consolidated following a joint motion made by Counsel for disputants and Respondent since the main bone of contention in all the cases is the same. Co-Respondents Nos 1 to 4 (as initially styled) were then joined as parties in the above cases. During the course of proceedings in the present matter, there have been changes brought to the responsibilities of certain Ministries by Government. With the agreement of parties, the names of the Ministries were amended to refer to their current appellations. There was no objection for Co-Respondent No 5 to be also joined as a party since the responsibilities for “Training” now fall under Co-Respondent No 5 and not under Co-Respondent No 1. Co-Respondent No 5 was given ample time to take cognizance of the case including proceedings held until then and also the opportunity to file any statement of case. Co-Respondent No 5 decided not to file any statement of case and the stand of Co-Respondent No 5 was to abide by the decision of the Tribunal. All the parties were assisted by Counsel except for Co-Respondent No 4 who was not assisted by Counsel. The Tribunal bore in mind that the Mauritius Institute of Training and Development was the Respondent in the case, that Co-Respondent No 5 was only joined as a co-respondent with new responsibilities pertaining to “Training” as from a particular date (whereas this responsibility was that of Co-Respondent No 1 before this change in responsibilities and appellations of Ministries) and that Co-Respondent No 5 was offered the opportunity to cross-examine witnesses and to adduce evidence if it so wished despite that Co-Respondent No 5 decided to abide by the decision of the Tribunal. The Tribunal also bore in mind the principles enunciated in section 97 of the Act, that the present matter concerns employment relations disputes, the possibility given to the Tribunal to deal with the matter with a minimum of legal formalities (section 15 of the Second Schedule to the Act) and the different stands of the parties before us. The terms of reference are identical in all the cases and read as follows:

1. *“Whether the post of Officer-in-Charge should be placed on the establishment and organisation structure of the Mauritius Institute of Training and Development (MITD).”*
2. *“Whether the MITD should recognise me as Officer-in-Charge since the time I have been performing the duties as such.”*
3. *“Whether the unilateral decision of the MITD to change the appellation of the acting/responsibility allowance which was paid to Officers-in-Charge as per the conditions of the post to an Adhoc allowance be declared null and void.”*
4. *“Whether the allowance (3 increments worth) forming part of my remuneration should:*

- (i) *Be computed for the purposes of the lump sum and pension payable to me at the time of my retirement and;*
- (ii) *Should form part of my salary for all purposes.”*

Disputant No 7 deponed on his own behalf and on behalf of the six other disputants before the Tribunal. He solemnly affirmed as to the correctness of the contents of his Statement of Case. His evidence was to the effect that the facts in the Statements of Case of the other disputants were similar to those in his own Statement of Case except for the relevant dates of appointment and years of service. He referred to the relevant dates applicable for the other disputants including their dates of ‘appointment’ as Officer in Charge following interviews which were held. He referred to the annexes to the Statements of Case of the other disputants. He also referred to the copies of the internal advertisements for the posts of Officer in Charge (For New Training Centres conducting NTC Foundation Course), Officer in Charge (For Training Centres conducting NTC Foundation Course) (two advertisements), Officer in Charge (NTC Foundation Course), Officer in Charge and Officer in Charge–PVE Centres as per Annexes 2(a) to 2(f) respectively to his own Statement of Case.

In cross-examination, Disputant No 7 agreed that at some point in time all the disputants including himself were working as Instructors at the Industrial and Vocational Training Board (IVTB). The post of Instructor was then converted into that of Training Officer. He considers that ‘Officer-In-Charge’ is a post at the Respondent though he conceded that the post is not on the establishment of the Respondent. He agreed that only Disputant No 3 is concerned with the advertisement annexed as Annex 2(b) (to his Statement of Case) and that the other disputants will be concerned with subsequent advertisements. He agreed that Annex 2(c) (to his Statement of Case) was a call for the ‘enlistment of services’ and that the remuneration was specified as being “an allowance (3 increment worth) over and above” the salary of the post of Training Officer.

Disputant No 7 was shown a document and he agreed that it was the offer made to him for the assignment of duties as Officer in Charge. He also agreed that as per the said letter, he kept his substantive post. There was no mention in the letter that he would be paid an acting or responsibility allowance nor that the allowance would form part of his salary or be taken into account for pension purposes. He accepted the assignment of duties as per the terms of the said letter. Disputant No 7 agreed that in **his** case, his payslip mentioned that he was being paid an adhoc allowance and the allowance was not termed as acting or responsibility allowance.

Disputant No 7 agreed that the advertisement for ‘Officer in Charge’ was in relation to a one year course known as the NTC Foundation Course. The project has changed and there is now a 4 year PVE Project whereby the fourth year of the course is to be conducted

by the Respondent. The 'Officers in Charge' were thus concerned with the new projects as regards the fourth year of study. After the 'nine-year schooling' was put to him, Disputant No 7 accepted that he took cognizance of the nine-year schooling and stated that he heard that the pre-vocational stream would be phased out. He conceded that Disputant No 2, just like him, is not directly concerned with the alleged unilateral change from acting/responsibility allowance to adhoc allowance. However, he suggested that this was a consolidated dispute along with all the other disputants since the other disputants were at some point in time earning an acting/responsibility allowance. He was not aware if there was an alleged error in the system of Respondent which led to the allowance bearing the name 'acting/responsibility allowance' for the other relevant disputants. He did not know if the alleged error was corrected by the Respondent in 2013. He did not agree that the allowance which was being paid to him and the other disputants was all along an ad hoc allowance.

Disputant No 7 was then cross examined in relation to two officers whom he had mentioned in his Statement of Case and he agreed that in the first case, the relevant post was an established post at the Respondent whilst in the second case, he was not aware of the duties the said officer was performing in the maintenance division.

In re-examination, Disputant No 7 stated that at the relevant time he used to represent all the employees in negotiations concerning the organisation structure at the Respondent. He referred to a document (extract produced and marked Doc A) which would suggest, according to him, that the relevant trade union was proposing the post of Head of Pre-vocational Education whereas the board approved the term 'Officer in Charge' which position would be filled from among officers holding a substantive post of Training Officer with five years of experience in that grade. He then referred to an extract of minutes of a meeting which the management of Respondent would have had with Co-Respondent No 3. Disputant No 7 averred that they have been carrying out the duties of Officer in Charge as per the duties laid down in the relevant advertisement at that time and have been remunerated accordingly. He stated that recently in an advertisement dated 2 February 2018 (Annex 13 to his Statement of Case), the term 'post' has been removed and instead mention has been made of assignment of duties as Officer in Charge - PVE Training Centre.

Mr Maudarbocus, the Acting Deputy Director of the Respondent deponed at another sitting. He stated that Disputants Nos 3, 1, 4 and 7 initially joined the "Ministry of Education" and he produced copies of documents in relation to each one of them (Docs B to E respectively). The other disputants were employed directly by the IVTB and he produced copies of documents in relation to Disputants 6, 5 and 2 (Docs F, G and H respectively). Mr Maudarbocus related lengthily how pre-vocational education started as a project of the IVTB in 1990 and then was transferred to another Ministry, that is, the Ministry of Education whereby a policy decision was taken that pre-vocational education

would be under the 'Management Trust Fund'. The IVTB then fell under the Ministry of Training which was a different Ministry. He explained why there was then a need to come up with a bridging course which students would follow before they could enroll in a specific course at the IVTB. The Ministry of Education approached the (then) Ministry of Training to design this course which was later called the National Trade Certificate (NTC) Course. The IVTB was allocated a separate budget to run this project. Mr Maudarbocus suggested that this was a temporary measure which was agreed at that time so that Government could decide on a proper policy for pre-vocational education.

The first batch for this course started in 2004 and the courses were run in existing training centres where there was enough space to accommodate the students but also in centres set up to run only the pre-vocational courses. Mr Maudarbocus stated that there was a need to have people to head the centres set up to run only pre-vocational courses. He averred that since they were requested to run the project on a temporary basis, no post was created on the establishment of the IVTB as Head of those training centres. Training Officers were instead assigned duties to head those training centres since there was no established position of Head of those training centres. It was merely a designated position which they termed as Officer in Charge to head the training centres dedicated to pre-vocational education.

Mr Maudarbocus stated that Annex 2(a) to the Statement of Case of the Disputant No 7 did not concern any of the disputants. Annex 2(b) concerned only Disputant No 3. The other disputants were concerned with advertisements which range from 2008 onwards. Mr Maudarbocus produced copies of letters issued to each of the disputants for assignment of duties as Officer in Charge, Officer in Charge-NTC Foundation and Officer in Charge (PVE Centres) (Docs I to O). He stated that there was nothing mentioned about appointment as Officer in Charge and that the Training Officers were granted three increments worth allowance over and above the salary of their substantive post. Mr Maudarbocus stated that in 2005 the IVTB implemented an IT system for their Payroll, HR and Finance system. At that time, when the system was designed, there was only one type of allowance that the system could cater for. This was responsibility allowance. Thus, he explained that when any allowance was paid during that period, that is, from 2005 till the end of 2012, the allowance was accounted as responsibility allowance. At the end of 2012, the Pay Research Bureau (PRB) Report 2013 came out and implementation of the report was as from January 2013. When they were implementing the PRB Report 2013, they then noticed this discrepancy. The system did not cater for different types of allowances and changes were brought to the system to cater for ad hoc allowance. Mr Maudarbocus however suggested that right from 2004, it was pointed out to the disputants that 'Officer in Charge' was not an established position but a designated position so that the allowance paid to them was an ad hoc allowance.

Mr Maudarbocus stated that the disputants have remained on assignment of duties as Officers in Charge. Mr Maudarbocus explained that with the change in government in 2005, there was an announcement that there was going to be a reform in the education and training system. The IVTB came under the aegis of the 'Ministry of Education' and the reform was going to affect also pre-vocational education. The Respondent thus waited and meanwhile year after year the NTC Foundation course was being run. There was a new Education Plan 2008-2020 and in 2011 the pre-vocational program was changed to a four years program. Mr Maudarbocus stated that they then knew that the project was going to stay. The IVTB then became the MITD (Respondent) and there were representations from unions that there was a need to have an established position at the head of pre-vocational centres. They started working on the organisational structure in 2010. Mr Maudarbocus suggested that the discussion with the union/s took a lot of time and that the proposal to have a Head of Pre-Vocational Centre on the establishment came in 2013. A consultant for the Respondent proposed to have such an established post and the Board allegedly accepted same but the unions were not agreeable with the organisation structure as proposed so that they had to work again on a new organisational structure. Meanwhile, in 2016 there was a new government and there was the introduction of the nine-year continuous basic education. There would thus be no need for pre-vocational education, according to Mr Maudarbocus, and pre-vocational education would be phased out. The last batch for pre-vocational education will be for 2020. The Board of Respondent then decided that there was no need to have the post of Head pre-vocational given that the project was going to be phased out. He stated that there is no need to have a Head Pre-vocational in a centre which is going to phase out in one year.

Mr Maudarbocus stated that as regards the Training Officer mentioned by the disputants, the latter was assigned higher responsibility in relation to an established post of Co-ordinator. According to him, the criterion was senior most Training Officer in that cluster and the latter was given a responsibility allowance. And in relation to the second officer whose name was mentioned, Mr Maudarbocus stated that the Training Officer was called at the Head Office to give assistance against an established post of Assistant Manager which was vacant. He added that since the allowance is an ad hoc allowance, it cannot be accounted for the purposes of lump sum and pension.

In cross-examination, Mr Maudarbocus agreed that there had been many changes over the years in relation to the policies to be adopted in the field of education. He stated that the pre-vocational project was implemented in 2004 and that same remained on a 'temporary basis' for four years until 2008. He stated that in 1996 following the dismissal of the then Director, there was an Officer in Charge who was heading the IVTB. He however stated that the post of Officer in Charge was not on the establishment. He stated that there was a need for a Head to run those centres. He did not agree that there is a list of duties attached to Training Officers and a different list of duties attached to Officers

in Charge. He was referred to Annexes 3(b) and 4(a) to the Statement of Case of Disputant No 7 and he stated that the duties of a Training Officer as per Annex 3(b) have been amended. He then agreed that as per the documents, the duties of a Training Officer are different from the duties of an Officer in Charge - NTC Foundation Course.

Mr Maudarbocus agreed that the advertisements for the post of Officer in Charge in 2004 and 2006 (Annexes 2(a), 2(b) to the Statements of Case of Disputants) did not mention that this was going to be in a temporary capacity. He suggested that this was “sous-entendu” given that the post was not on the establishment of Respondent. Mr Maudarbocus stated that the document as per Annex 3(a) to the Statement of Case of Disputant No 7 was in fact the same annex to the letter of offer of assignment of duties issued to each disputant. He stated that with the nine-year schooling there will be a phasing out of pre-vocational education even though he agreed that nobody can tell if there will be a new policy in the future. He added that if tomorrow the decision changes, the Respondent will review his decision.

Mr Maudarbocus agreed that the advertisements of 2004 and 2006 (for Officer in Charge (For New Training Centres conducting NTC Foundation Course) refer to a competitive package to be offered to the selected candidate. He agreed that in the payslips of the (relevant) disputants, the allowance was paid initially as a responsibility and acting allowance. He referred once more to the alleged error in the system which lasted for some years. Mr Maudarbocus then stated that for several years a sum of money was being deducted from the salary of each of the relevant officers based on the allowance and paid to SICOM when this should not have been done. He stated that Respondent has not made any refund yet because of the present matter, and that Respondent is ready to refund whatever surplus deductions have been applied on the salaries of those employees. Mr Maudarbocus stated that a designated position is a post which is not on the establishment of an organisation but relates to a specific need which arises whereby specific duties have to be done. Since the Respondent was not aware of the policy to be adopted in relation to pre-vocational education, the Respondent did not put a Training Centre Manager or Assistant Manager to head the pre-vocational centres. He also added that this was not a project of the Respondent but that of Co-Respondent No 1 and the budget for it was in the budget of that Ministry.

Mr Maudarbocus explained the procedures to create a post at the Respondent. He stated that Respondent could not refuse doing the pre-vocational classes because it was a policy of government and there were students involved. He conceded that it would not have been possible without the Training Officers with five years' experience but he suggested that the disputants were not forced to apply for the said positions. He did not agree that Officer in Charge was a higher post or a post with higher responsibilities but added that additional duties were given to the Training Officers. He agreed that Disputant No 7 had in the meantime retired on ground of age.

Mr Maudarbocus stated that in 1990, centres which were offering pre-vocational education were headed by a Supervisor and not an Officer in Charge. The post of Supervisor was an established position on the organisational structure of the then IVTB. When questioned about Surinam Training Centre, Mr Maudarbocus conceded that an officer was Officer in Charge at the relevant time but he stressed that Surinam Training Centre was not a pre-vocational training centre but a vocational centre. The head of that centre was an Assistant Manager and that post was vacant. The officer who stepped in was then Officer in Charge against an established position. He was the most senior Training Officer at that centre, though not overall among all centres, and he was assigned responsibility against an established post. Mr Maudarbocus stated that the Training Officer was given additional responsibilities and was responsible for that vocational centre and was thus called Officer in Charge. He stated that the officer was not called Acting Assistant Manager since he was not the most senior Training Officer at the Respondent but only for that Centre. This was an assignment of duties which was particular to that Training Centre only so as not to cause disruption of training. It would have been against the own policy of the Respondent to call that officer Acting Assistant Manager.

Mr Maudarbocus did not agree that it was unfair for the Respondent to create a 'designated position' and then for that job, fail to give the employees their dues, that is, pay a responsibility allowance. He stated that a post will be a designated position where there are specific duties which are not in relation to the organisational structure of the Respondent. However, he added that when the project was finalized, the Board was agreeable to create the post of Head of Pre-Vocational. With the new reform in the education sector, the project was no longer to be there and thus the Board did not go ahead with that post. He also produced a copy of a letter dated 7 December 2017 emanating from the Financial Secretary (Doc Q). In re-examination, he stated that Disputant No 3 was assigned duties of Officer in Charge for 'pre-voc' for a period of nearly six months but he could not say what happened after that period. He stated that the letter of offer is the contract between the parties and everything is spelt out in the letter of offer.

The representative of Co-Respondent No 1 deponed before the Tribunal and she stated that Co-Respondent No 1 addressed a letter to the Financial Secretary and the latter then gave an advice which is dated 7 December 2017. She confirmed that Doc Q was the letter received from the Financial Secretary. She was questioned in relation to the initial letter dated 27 October 2017 emanating from Co-Respondent No 1 and which led to the reply in the form of Doc Q. She also produced (at another sitting) a copy of a letter (Doc S) emanating from her Ministry.

In cross-examination, she agreed that in the present matter, pension contributions were being paid both by the employees and the Respondent to Co-Respondent No 4. The contributions have been paid since 2004 until 2013. The Respondent used the 2013 PRB Report to stop the above payments. The representative stated that the post was not an

established post but only a designated post. She stated that a designated post is a post which does not appear in the PRB report and to which there is no salary attached. The representative of Co-Respondent No 1 was referred to a paragraph from a brief on the matter from her Ministry (Doc S) and she stated that the paragraph emanated from the Respondent and was merely reproduced by her Ministry. Following cross-examination by counsel for Respondent, she stated that the position of Co-Respondent No 1 is that the allowance was paid to the disputants *vice* a designated position and that therefore it cannot be reckoned for pension purposes. She stated that with the introduction of the nine years continuous basic education, the pre-vocational stream will be phased out by the year 2020. She stated that Disputants Nos 2 and 7 were assigned responsibilities as Officer in Charge only as from January 2014.

The representative of Co-Respondent No 2 also deponed before the Tribunal and she stated that they were asked by the Financial Secretary to give their advice on whether the allowance paid for shouldering the responsibilities of Officer in Charge should be reckoned for pension purposes. Their advice was that this cannot be recommended and she produced a certified copy of the advice (Doc R). She referred to conditions mentioned in the 2016 PRB Report for pensionable emoluments when someone is shouldering higher responsibilities. According to Co-Respondent No 2, these conditions were not met in the present case. She also produced a copy of a letter whereby the views of Co-Respondent No 2 were sought (Doc T).

In cross-examination, the representative of Co-Respondent No 2 stated that a designated position is a position which is listed for administrative purpose to give someone an additional responsibility or to take charge of some responsibilities. According to her, the top management of a Ministry or of an institution can designate someone to take higher responsibilities. She stated that the allowance cannot be accounted as pensionable since there was no established post and it was an adhoc allowance. She stated that, in principle, an adhoc allowance is for a limited period of time even though she added that this will depend on a case-to-case basis. She stated that the disputants have been given additional duties but that assignment of duties requires the approval of the relevant Service Commission or is done under delegated power from the said Service Commission. She then conceded that as per documents produced and referred to her, the disputants were assigned the duties of 'Officer in Charge'. She agreed that since disputants were given three increments' worth allowance over and above the salary of their substantive post, there was an increase in responsibilities for them. She however stated that the issue was that Officer in Charge was not on the structure of the Respondent. She accepted that her Ministry did not consider the letters of assignment of duties before giving the advice in relation to whether the allowances paid were pensionable.

The representative of Co-Respondent No 3 also deponed and he produced a document purporting to show very briefly the points discussed between the management of Respondent and Co-Respondent No 3 at a meeting held on 18 December 2015 (Doc V). In cross-examination, he was shown a document purporting to be an extract of the 1993 PRB Report and he agreed that it related to the then IVTB and that, as per the said document, there was then a post of Officer in Charge at the IVTB with its salary scale. This document was produced and marked Doc W. In further cross-examination, he stated that Officer in Charge is not graded by Co-Respondent No 3, that is, the post is not listed in the salary schedule of the PRB Report for Respondent.

Co-Respondents Nos 4 and 5 did not wish to adduce any evidence before the Tribunal and the Tribunal thus proceeded to hear submissions from all Counsel appearing in the present matter.

The Tribunal has examined carefully all the evidence adduced before it including all the documents produced and submissions of Counsel. Only the disputants and the Respondent have filed Statements of Case (detailed documents) in the present matter. The stand of Co-Respondent No 1 before the Tribunal is that Co-Respondent No 1 shall be abiding by the decision of the Tribunal. The stand of Co-Respondent No 2 is that the allowance paid over the years and the subject matter of the dispute cannot be reckoned for pension purposes. The stand of Co-Respondent No 3 is that the post of Officer in Charge at the Respondent does not figure in the organisation structure of the Respondent and is not graded by the Co-Respondent No 3. The representative of Co-Respondent No 4 stated that Co-Respondent 4 will abide by the decision and added that as administrator of the pension funds, Co-Respondent No 4 administers the funds in accordance with the Statutory Bodies Pension Funds Act. He added that 'pensionable emoluments' is defined in that Act and being given that Officer in Charge is not a post in the establishment, so it would not fit in the category which is included in 'pensionable emoluments'. The stand of Co-Respondent No 5 is that Co-Respondent No 5 will abide by the decision of the Tribunal.

It is apposite to note that the proceedings in the above seven consolidated cases were very lengthy with the Tribunal having conducted no less than five hearing sessions and the cases were also postponed on many occasions including for the unavailability of Counsel for disputants, then members on the panel, and then a witness, all on medical grounds, the rescheduling of the cases following the nationwide Curfew Order in the light of the Covid-19 pandemic and the joining of Co-Respondents as parties to the proceedings and necessary amendments which were thereafter required following a change of responsibilities and names of relevant Ministries following Government decision.

At the time the cases were referred to the Tribunal by the Commission for Conciliation and Mediation, the Employment Relations (Amendment) Act 2019 was not yet in force. Section 29 of the Employment Relations (Amendment) Act 2019 which repeals and replaces section 108 “Savings and transitional provisions” in the main Act provides as follows at its sub-section (9):

108(9) “Any labour dispute pending immediately before the commencement of the Employment Relations (Amendment) Act 2019 before the Tribunal shall be dealt with in accordance with Part VI as if the definition of “labour dispute” in section 2 and sections 64, 65, 69, 70, 76, 78 and 88 have not been amended or repealed and replaced.”

Labour dispute was thus defined under section 2 of the main Act (prior to the 2019 amendment) as follows:

“labour dispute” – (a) means a dispute between a worker, or a recognised trade union of workers, or a joint negotiating panel, and an employer which relates wholly or mainly to wages, terms and conditions of employment, promotion, allocation of work between workers and groups of workers, reinstatement or suspension of employment of a worker; (b) does not, notwithstanding any other enactment, include a dispute by a worker made as a result of the exercise by him of an option to be governed by the recommendations made in a report of the Pay Research Bureau or a salary commission, by whatever name called, in relation to remuneration or allowances of any kind; (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 first point in dispute as worded does not fall strictly within the definition of “labour dispute” given above and more particularly paragraph (a) of the definition. The dispute is whether the post of “Officer-in-Charge” should be placed on the establishment and organisation structure of the Respondent. The dispute does not relate wholly or mainly to wages, terms and conditions of employment, promotion, allocation of work between workers and groups of workers, reinstatement or suspension of employment of a worker. Also, the creation of a post or the placing of a post on the establishment and organisation structure of an employer is something which is essentially within the “pouvoir de direction” of the employer. The Tribunal certainly cannot award that the post of Officer in Charge should (underlining is ours) be placed on the establishment and organisation structure of the Respondent. This would be beyond the powers and jurisdiction of the Tribunal. The point in dispute no. 1 is thus purely and simply set aside.

As regards point in dispute no. 2, the Tribunal fails to understand the exact purport of the dispute. The Tribunal will thus rely on the relevant ordinary dictionary meaning of the word “recognise”, that is, “to accept that something is legal, true or important” (Cambridge Dictionary) or to “acknowledge the existence, validity or legality” (Oxford Dictionary) of something. This term of reference is rather **vague**. The Tribunal is, in any event,

proceeding on the basis that the Respondent is not disputing that the disputants have been assigned the duties of Officer in Charge and, very importantly, disputants have been paid an allowance (whatever be the name given to it) for this assignment of duties. The crux of the dispute is that the Respondent is averring that the post of Officer in Charge was not on the establishment of the Respondent (at the relevant time) and was merely a “designated position”. The Tribunal cannot read more from the terms of reference at point in dispute no. 2, as drafted, than a request for Respondent to recognise each disputant as Officer in Charge, and which the Respondent did, at least to some extent, since the latter were assigned the duties (as per relevant list of duties) of Officer in Charge and paid an allowance for the said assignment of duties (underlining is ours).

The Tribunal certainly cannot award that Respondent should recognise Disputant as Officer in Charge in the sense that Respondent should accept or agree (underlining is ours) that the post of Officer in Charge is an established post at the Respondent. This is the bone of contention between the parties and the case for the Respondent is that this post is not on the establishment of the Respondent. Even the disputants are nowhere saying that the post of “Officer-in-Charge” was on the establishment of the Respondent at the relevant period. The Tribunal cannot award that Respondent should accept or agree that Officer in Charge is an established post at the Respondent when the evidence shows otherwise. The unchallenged evidence on record however is that the disputants have indeed been performing duties as per a list of duties pertaining to an Officer in Charge and thus have been paid an allowance for performing the said duties. Whilst the Tribunal has no issue with the last part of the terms of reference, that is, “since the time I have been performing the duties as such”, the first part has been drafted in a too vague manner to allow the Tribunal to award that the Respondent *should recognise* the disputants as Officers in Charge.

Subject to what we stated and for the reasons given above, point in dispute no. 2 is thus otherwise set aside.

As regards point in dispute no. 3, this will not apply strictly for Disputants nos. 2 and 7 since the two disputants were shouldering the responsibilities of Officer in Charge, PVE Centres as from 23 January 2014 and were paid an ad hoc allowance as from the beginning (as opposed to the other disputants who were previously paid an acting/responsibility allowance which was later referred to as adhoc allowance).

Though it was not mentioned in any of the internal advertisements produced nor in any of the letters of offer made to the disputants, yet it is agreed that for Disputants No 1, 3, 4, 5 and 6 the allowance paid to them was described as Acting/Responsibility allowance in their payslips. In the case of Disputant No 3 the evidence suggests that this must have been going on for some six years whilst for Disputants Nos 1 and 4 it would have been for nearly five years. Then in 2013 following the PRB Report 2013, the Respondent would

have realized this was a mistake. There was allegedly only one type of allowance (acting/responsibility allowance) that could be inserted on the relevant IT/Finance system being used at the Respondent and finally a correction was done in 2013 whereby the allowances were as from then on described on the payslips of the relevant disputants as adhoc allowance.

The Tribunal is of the opinion that the name or description used for an allowance may not necessarily (though most often this will be the case) be conclusive as to the nature of the allowance being paid. Much will depend on why the allowance is being paid and the circumstances leading to the relevant officer performing such duties which warrant the payment of the allowance. Suffice it to say however, that an adhoc allowance is meant to apply for a particular purpose as necessary or needed.

In the present matter, the relevant disputants were being paid, what was described on their relevant payslips as Acting/Responsibility allowance, as from 21 December 2006 (in the case of Disputant No 3), as from 6 February 2008 in the case of Disputants Nos. 1 and 4 and as from 1 January 2012 in the case of Disputant No 5. Disputants 2 and 7 are not directly concerned with this dispute since they have been assigned duties as Officer in Charge (PVE Centres) with effect from 23 January 2014 and there is no evidence on record that acting/responsibility allowance was mentioned (for the same allowance) on their payslips. There is evidence that the assignment of duties is continuing until now except obviously for those who have meanwhile retired from the service. Thus, even if for the sake of argument we proceed on the basis that Disputants 2 and 7 are raising point in dispute No 3 purely in their capacity as Training Officers who were assigned duties as Officers in Charge, we find that the terms of reference of the dispute leave very little choice to the Tribunal. As highlighted above, the name given to a particular allowance is not what really matters but instead more importantly is the reason why the allowance is being paid and the quantum of the said allowance. As regards the quantum, there has been no change for any of the disputants which would warrant the intervention of the Tribunal. The reason for the payment of the allowance has also not changed and it was because each of the disputants had been assigned higher duties and in one case it was as Officer in Charge (Disputant No. 3), in other cases as Officer in Charge (NTC Foundation) (Disputants Nos. 1, 4, 5 and 6) and in some cases as Officer in Charge (PVE Centres) (Disputants Nos. 2 and 7).

In neither of these cases has it been averred that Officer in Charge, Officer in Charge (NTC Foundation) or Officer in Charge (PVE Centres) were posts which were at the relevant time (underlining is ours) on the establishment of the Respondent. In the absence of such posts on the establishment, the unavoidable conclusion is that the disputants who had been requested to shoulder the higher responsibilities could not be granted acting or responsibility allowance. The Tribunal may here refer (for guidance

only since Respondent is a parastatal body) to the following provisions in the PRB Report 2016 (Volume 1 under Acting and Responsibility Allowances):

18.10.1 An officer who has been appointed to act in a higher post by the appropriate Service Commission or by the Responsible Officer/Supervising Officer as delegated, is normally paid an acting allowance. An acting appointment, however, does not give right to the officer concerned to claim for promotion to the higher position.

...

18.10.3 A Responsibility Allowance is paid to an officer, who for administrative convenience, has been assigned duties of a higher office by the appropriate Service Commission or by the Responsible Officer/Supervising Officer, as delegated.

...

Acting Allowance

Recommendation 1

18.10.7 We recommend that the quantum of acting allowance payable, whether in a grade-to-grade or class-to-class situation, should be equivalent to the difference between the initial or flat salary of the higher post and the substantive salary of the officer, provided the allowance is not less than three increments worth at the incremental point reached in the substantive post. Where the salary scales overlap, the allowance should be equivalent to three increments worth at the incremental point reached in the substantive post provided the total emoluments of the officer are not less than the initial salary and not more than the maximum salary of the higher post.

Responsibility Allowance

Recommendation 2

18.10.8 We recommend that responsibility allowance should continue to be paid as follows: (i) where an officer is fully qualified to act in the higher post, the allowance should be equivalent to the acting allowance; (ii) where the officer is not fully qualified to act in the higher post, the allowance should be 80% of the acting allowance; and (iii) where appointment to a higher office is made by selection and no additional qualification is required, whether in terms of academic or technical qualification or experience or in terms of physical requirements, the responsibility allowance payable to officers who are assigned the duties of the higher office should be equivalent to the acting allowance.

'Higher post' or 'higher office' whether under the PRB Report 2016 or under The Statutory Bodies Pension Funds Act (as will be seen later) will necessarily refer to a post or office which is on the establishment of an organisation (and graded by Co-Respondent No 3 if the organisation just like Respondent is governed by Co-Respondent No 3). It is indeed not challenged that the Respondent is governed by the recommendations of the PRB. The 'higher post' or 'higher office' must thus have a salary on its own, be it a flat salary or a salary scale. Despite the initial internal advertisements mentioned earlier, there is no evidence before us of any salary (be it flat or in a scale) prescribed for Officer in Charge at the Respondent. The Tribunal thus cannot, even if it was minded to, award or declare that a change in nomenclature of the allowance paid to the disputants was null and void. The quantum of the allowance paid remained the same and the Tribunal finds no reason to intervene on this score. The change in appellation of the allowance (for relevant disputants) *per se* does not amount to a "*modification d'une condition essentielle du contrat de travail*" as could, for example, be a decrease in the quantum of the allowance paid. As highlighted above, the nature of an allowance and the reason why it is being paid are more important and may lead to an allowance to be treated differently, as compared to the appellation which may be attributed to it. The pension contributions made by the Respondent **and** each of the relevant disputants on the allowance paid to the said disputants raise much more concerns and issues. Be that as it may, this is not the dispute before the Tribunal as per the terms of reference of the point in dispute No. 3.

Also, the Tribunal has ruled in a series of cases that it does not give awards which are of a declaratory nature. In the case of **Mr Ringanaden Sawmynaden And Mauritius Cane Industry Authority, ERT/RN 20/19**, the Tribunal stated the following: "*The Tribunal has stated in numerous cases (vide Mr Ugadiran Mooneeapen (above) [Mr Ugadiran Mooneeapen And The Mauritius Institute of Training and Development, RN 35/12] ; Mr Abdool Rashid Johar And Cargo Handling Corporation Ltd, RN 93/12; Mr Dhan Khednee And National Transport Corporation, RN 52/14; Mr Satianund Nunkoo And Beach Authority, RN 121/17) that it does not deliver awards which are of a declaratory nature. The Tribunal delivers awards which are binding on parties (Section 72 of the Act).*"

The point in dispute No. 3 is thus also set aside for all disputants.

As regards point in dispute no. 4, it is not disputed that the disputants were all paid the allowance. It is also not challenged that the Respondent is a 'statutory body' for the purposes of The Statutory Bodies Pension Funds Act. The relevant provisions which will guide the Tribunal on this issue include sections 2, 8 and 9 of The Statutory Bodies Pension Funds Act and regulation 4 of The Statutory Bodies Pension Funds Regulations (which is the corresponding provision of paragraph 15.29 in the PRB Report 2016 (Volume 1) even though the latter provision applies for public officers who have been

appointed to act in or have been assigned duties by the appropriate Service Commission or under relevant delegation of power). These provisions (relevant parts) read as follows:

The Statutory Bodies Pension Funds Act

2. Interpretation

(...) "pensionable emoluments"- (a) includes salary, car benefit, personal pensionable allowance, house allowance, the estimated value of free quarters or rent allowances as may be prescribed and any allowance in the nature of a cost of living allowance or additional remuneration, by whatever name called; but

(b) does not include duty allowance, entertainment allowance or any other allowance paid to an officer at the time of his retirement.

"pensionable office" – (a) means an office held by an officer; and

(b) in relation to a local authority, includes an office in the establishment of the local authority or an office which has been declared as such by the local authority with the approval of the Local Government Service Commission and published in the Gazette;

8. Amount of pension benefit

The amount of pension benefit to which an officer is eligible shall be computed-

(a) in respect of an officer appointed before 1 January 2013, by reference to the annual pensionable emoluments drawn by him at the date of his retirement; or

(b) in respect of an officer appointed on or after 1 January 2013, in such manner as may be prescribed.

9. Grant of pension benefit or gratuity

An officer shall, subject to this Act, be granted a pension benefit or gratuity in such circumstances and in such manner as may be prescribed.

Statutory Bodies Pension Funds Regulations

4. Computation of pension and gratuity

4(7) Where an officer has been appointed to act in or assigned the duties of –

(a) a higher office in a position of Accounting Head or Chief Executive, the salary of which is not less than 101,000 rupees a month; or

(b) a higher office than that specified in subparagraph (a) in the same cadre,

and retires or is subsequently reverted to his substantive office, the amount of pension or gratuity for which the officer is eligible shall be computed by reference to the annual pensionable emoluments attached to the higher office or, in case he is drawing part of the allowance, the annual aggregate pensionable emoluments, provided that –

(i) he has –

(A) performed the duties of the higher office for a continuous period of not less than 12 months;

(B) not been reverted to his substantive office on the grounds of inefficiency or misconduct or at his own request; and

(C) at the time of retirement or reversion –

(I) performed the duties of the higher office and reached the age of 50 before 1 July 2008;

(II) where he was in post as at 30 June 2008, reached the age at which he may retire with the approval of the statutory body, as specified in the Third Schedule; or

(III) where he is appointed in the service on or after 1 July 2008, reached the age of 55; or

(ii) he has successfully performed the duties of the higher office for a minimum period of 6 months and has reached compulsory retirement age.

(8) Where an officer has been appointed to act in or assigned the duties of a higher office, other than an office referred to in paragraph (7), and retires or is subsequently reverted to his substantive office, the amount of pension or gratuity for which the officer is eligible shall be computed by reference to the annual pensionable emoluments attached to the higher office or, in case he is drawing part of the allowance, the annual aggregate pensionable emoluments, provided that –

(a) he has performed the duties of the higher office for a continuous period of at least 2 years or an aggregate period of at least 2 years within a period of 3 years;

(b) he has not been reverted to his substantive office on the grounds of inefficiency or misconduct or at his own request; and

(c) at the time of retirement or reversion –

- (i) he has performed the duties of the higher office and reached the age of 50 before 1 July 2008;*
- (ii) where he was in post as at 30 June 2008, he has reached the age at which he may retire with the approval of the statutory body, as specified in the Third Schedule; or*
- (iii) where he is appointed in the service on or after 1 July 2008, he has reached the age of 55. (...)*

On the same reasoning adopted by the Tribunal under point in dispute no. 3 above, the Tribunal has no alternative than to find that since Officer in Charge was not an established post at the Respondent at the relevant periods, the disputants had not been assigned the duties of a higher office. (underlining is ours) They were merely paid an allowance for shouldering higher duties but these duties did not pertain to an established post with its own emoluments determined by Co-Respondent No 3. Moreover, the letters of assignment of duties do not mention that the allowance paid will be pensionable. The disputants were requested, as per the letters of assignment of duties (Docs I to O), to sign a copy of their letter and return same if they accepted the assignment of duties on the terms and conditions set out in the letters.

Based on the relevant statutory provisions, relevant recommendations of the PRB and the absence of an established post of Officer in Charge at the Respondent, the Tribunal cannot intervene in the present matter, despite several disturbing features which have attracted our attention, to grant an award in favour of the disputants and which would become (or be deemed to be) an implied term of the contract of employment between each of the disputants and Respondent. To hold otherwise may be interpreted as being tantamount to usurping the powers of other relevant bodies. The Tribunal cannot award that the allowance paid to the disputants, as matters stand and whereby the post of Officer in Charge (for Pre-Vocational Centres) was not put on the establishment of Respondent, should be computed for the purposes of the lump sum and pension payable to the disputants. Though the allowance formed part of the salaries earned by the disputants for quite some time, the Tribunal cannot make a blanket declaration that it should form part of the salary of each disputant for **all** purposes. For all the reasons given above, the Tribunal cannot intervene to grant an award as per the prayers in point in dispute no 4. Point in dispute No. 4 is thus also set aside.

However, the Tribunal cannot leave matters as they are in the present matter. We are in the realm of employment relations matters where good and harmonious relations are *sine qua non*. Bearing in mind the principles specifically provided under section 97 of the Act, such as, principles of natural justice and the principles and best practices of good employment relations, the Tribunal wishes to highlight that the lengthy proceedings and

substantive evidence adduced in the present matter have allowed important matters to come to the surface which, according to us, deserve to be duly considered by the appropriate authorities. The evidence adduced has shown a series of shortcomings on the part of the Respondent which led to the present disputes. We will merely highlight the following:

- (1) the internal advertisements issued by the Respondent including for the “post” of Officer in Charge (For Training Centres conducting NTC Foundation Course), Officer in Charge – (NTC Foundation Course) or Officer in Charge (as per Annexes 2(b), 2(d) and 2(e) respectively to the Statement of Case of Disputant No 1) where the remuneration was given as “A competitive package will be offered to the selected candidate” in the first case and “As per PRB Report 2008” in the second and third cases;
- (2) the internal advertisements are more consonant with a selection process proper as opposed to a designation of officers;
- (3) the payslips of the relevant disputants referred for several years in certain cases to Acting/Responsibility Allowance before this appellation was finally replaced by adhoc allowance;
- (4) both the Respondent and the relevant disputants were making contributions (thus leading to the salaries of relevant disputants having been wrongly debited for years by the Respondent) on the allowances paid to the disputants to Co-Respondent No. 4 for pension purposes;
- (5) the Respondent created a situation which led to something very much akin to a legitimate expectation on behalf of the relevant disputants that the allowance they were being paid could be considered as being pensionable;
- (6) the representative of Respondent conceded clearly that at some point in time the Respondent did consider and proposed to put the post of Head Pre-Vocational Centre on the establishment of the Respondent (thereby showing that such responsibilities were not or no longer considered as being temporary in nature but of such nature as would warrant the creation of a proper post) but this could not be done for certain reasons;
- (7) even if Respondent is relying on an averment that the IT/Finance system at Respondent had wrongly accounted the allowance as acting/responsibility allowance (averring “erreur”), the relevant disputants who were, accordingly, required to contribute on the allowances paid to them for their pension cannot be made to suffer for the alleged mistake of the Respondent which lasted for years in some cases;
- (8) the length of time for which the additional responsibilities as Officer in Charge have been shouldered continuously by the disputants coupled with the facts of the present case reinforce the need for relevant authorities to consider seriously

means and ways on an *exceptional basis* to how best remediate this unfortunate situation which has been created;

- (9) the Respondent and other parties and any other relevant body whose intervention may be required have with this rather unfortunate case, a good opportunity to demonstrate their willingness to uphold the principles and best practices of good employment relations;
- (10) the Tribunal is confident that the parties and any other relevant body in relation to the present matter will be sensitive to the appeal made by the Tribunal.

The Tribunal will end by quoting from the case of **Government Servants' Association and The Master & Registrar & Anor, RN 298** where the then Permanent Arbitration Tribunal stated the following:

“These proceedings have involved a number of institutions, including the Public Service Commission and we are grateful to all those concerned for their utmost cooperation. The Tribunal is conscious that it should not be seen as seeking to usurp the exclusive rights of other authorities. Our sole aim is and can only be industrial peace and the promotion of Justice.”

For all the reasons given above, all the disputes are otherwise set aside.

(SD) Indiren Sivaramen
Vice-President

(SD) Abdool Kader Lotun
Member

(SD) Karen K. Veerapen
Member

(SD) Ghianeswar Gokhool
Member

24 August 2020