

**EMPLOYMENT RELATIONS TRIBUNAL**

**AWARD**

**ERT/ RN 69/20-71/20**

**Before**

<b>Indiren Sivaramen</b>	<b>Vice-President</b>
<b>Francis Supparayen</b>	<b>Member</b>
<b>Rabin Gungoo</b>	<b>Member</b>
<b>Kevin C. Lukeeram</b>	<b>Member</b>

**In the matter of:-**

**Mrs Anuradha Bundhun (Disputant No. 1)**

**And**

**ABSA Bank (Mauritius) Ltd (Respondent)**

**i.p.o Barclays Bank Mauritius Staff Association (Co-Respondent)**

**Mr Bhojraj Daby (Disputant No. 2)**

**And**

**ABSA Bank (Mauritius) Ltd (Respondent)**

**i.p.o Barclays Bank Mauritius Staff Association (Co-Respondent)**

**Mrs Sujata Retif (Disputant No. 3)**

**And**

**ABSA Bank (Mauritius) Ltd (Respondent)**

**i.p.o Barclays Bank Mauritius Staff Association (Co-Respondent)**

The above cases have been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(9)(b) of the Employment Relations Act 2008, as amended (hereinafter referred to as “the Act”). The Co-Respondent has been joined as a party in the interests of justice and all three cases were consolidated with the agreement of parties. All three disputants, the Respondent and the Co-Respondent were assisted by Counsel. The terms of reference are identical in all three cases, except in the case of Disputant No. 3 where the effective period mentioned was as from November 2016 (instead of July 2017), and read as follows:

*“Whether the terms and conditions of employment (salaries, end of year bonus, financial bonus, travelling, travel grant, leave entitlement, merit increase among others) following my promotion to the grade of AVP should be realigned with those of staff which have been promoted prior to January 2016 with effect from July 2017 or otherwise.”*

The Respondent had taken a plea *in limine* and the Tribunal has heard arguments and delivered a ruling ordering the cases to be heard on the merits. Disputant No. 3 deponed before the Tribunal and she solemnly affirmed as to the truthfulness of the contents of the Statements of case filed on behalf of the Disputants. She stated that today there are two sets of conditions for one grade of workers. She averred that she must be aligned with the same set of conditions as her colleagues who were in post before 2016 and who were given terms and conditions of employment as per the collective agreement then in force. She stated that when she received her letter of promotion in October 2016, there were terms and conditions inserted in that letter and she noticed that these were different from those enjoyed by colleagues who were already in the same grade. She had discussions with the Head of HR and the new Head of Department and she was made to understand that there were negotiations with the union on this issue.

Disputant No. 3 averred that the financial statement provides that the Respondent is making a profit of around MUR 2.8 billion and she did not agree that the bank will be in a financial distress if the same terms and conditions are granted to everyone in that grade bearing in mind the cost to be incurred by the bank as mentioned in the Statement in Reply filed on behalf of Respondent if such a step is to be taken. She stressed on the principle of ‘equal work, equal pay’.

In cross-examination, Disputant No. 3 stated that she would not have obtained her promotion if she had not signed her new contract of employment. She stated that she did ask questions and escalated the matter. She stated that she avoided making any grievance since she trusted the bank and was told that there were already negotiations on this issue. She agreed that all those who have been promoted after her have the

same terms and conditions as she has. Disputant No. 3 stated that within the same grade, you have different roles, but responsibilities associated with these roles have been assessed and evaluated as falling within that grade. She stated that they may be having different roles, yet they should be having the same benefits since they are performing work of the same value. She agreed that the dispute was not in relation to salary but in relation to terms and conditions, that is, travel grants, leaves and end of year bonus. Disputant No. 3 stated that she works in Segment A which is less profitable than Segment B. She agreed that there were strategies put in place by the bank to make Segment A more profitable than previously. She agreed that there was the sale of SWN flagship branch in 2018, sale of property still in 2018 and the closing of five branches in 2015. There was also a reduction in head count. She agreed that the bank can take certain decisions and organize itself in a manner to ensure its profitability, but she added that the bank should at the same time comply with the labour law.

Disputant No. 3 agreed that the collective agreement of 2013 had already expired in 2017. On further cross-examination, she stated that her contract had to be in line with the said collective agreement which she stated should have prevailed pending the new collective agreement. There was a new collective agreement in 2018 but the issue in the present case was not finalized and kept in abeyance. She confirmed that she is the only Procurement Manager at the Respondent though she has colleagues in the same AVP grade as her in the retail risk function. She confirmed that she is a member of the Co-Respondent and that the latter represents the bargaining unit in which she is.

Disputant No. 2 also deponed before the Tribunal and he solemnly affirmed as to the truthfulness of the contents of his statement of case. In cross-examination, he stated that he is the manager of the Treasury Operations Department and that there is no one else at the bank who does exactly the same function as he does. He signed his contract because he trusted the Head of HR. Disputant No. 1 also deponed before the Tribunal and she confirmed that the contents of her statement of case are true. In cross-examination, she stated that she is the Collections Strategy Manager at the Respondent and that nobody else does the same job function as her at the bank.

Mr Koolwant, the Head of Talent Acquisition at the Respondent then deponed and he averred that the Benefits Guide for AVP and VP grades was prepared for internal use in the HR department. He added that it was never circulated in the bank and not even communicated to the Co-Respondent. He stated that nobody else at the bank does the same job as the disputants do. In cross-examination, he stated that the Co-Respondent is the union representing the AVP and VP grades.

Mr Davis, Finance Director at the Respondent, then deponed and he explained that previously the bank operated as 'two banks', that is, Barclays Bank (Mauritius) Branch (Domestic) and Barclays Bank (Mauritius) Offshore Banking Unit. There were two sets

of employees and then the law was changed, and banks could have only one banking licence. Post 2004, they had only one banking licence and operations were merged under one entity - Barclays Bank (Mauritius) Branch. However, there are two segments which are distinct strategic business units (SBUs) completely different one from the other. As per guidelines from the Central Bank, these are known as Segment A and Segment B. He explained the difference between the two segments and stated that the Disputants work for Segment A. He stated that the Bank of Mauritius and the Mauritius Revenue Authority impose that the bank must have separate accounting systems and separate processes for decision making for Segment A and Segment B. There is a separate management looking after Segment A and a separate management looking after Segment B. Also, there is one payroll for Segment A and another payroll for Segment B.

Mr Davis stated that as from 2010, Segment A, which employs about 85% of his colleagues, has been a struggling business. It was a loss making SBU whilst Segment B was profitable. The bank had to take decisions and these involved improving the income line and managing the cost side better. He stated that the bank closed ten branches over the last ten years and had to sell properties that it owned. The Respondent also had to tackle staff cost which at one point in time represented more than 65 or 70% of total cost. However, this had to be balanced against two things: 1. members of the staff are the talents of the bank and those who make the bank live and the bank wanted to preserve jobs; and 2. the bank had to ensure that AVPs and VPs were paid appropriately when compared to their peers on the market. He averred that his colleagues are remunerated better on a total package than their peers in other banks. He also stated that within the AVP grade it is difficult to compare internally the jobs which the different AVPs are doing since these functions are technical and require different sets of experiences. He stated that those who are promoted in the same grade 'post 2016' obtain the same level of benefits. Among AVPs, he stated that 52% of the workforce are now deriving benefits on terms and conditions post 2016. He stated that with the measures taken by the bank, things have improved until 2019 but with the Covid-19 pandemic he suggested that things have gone backwards, and that Segment A is back into big difficulties. He also stated that 'post 2016' there has not been a major turnover of staff and the turnover rate is around 2 or 3% yearly.

In cross-examination, Mr Davis agreed that benefits for Respondent for the year 2017 were to the tune of MUR 1,919 million, for 2018 MUR 2,086 million and 2019 MUR 2,830 million. He agreed that there is a recognized trade union at the bank with whom the bank has signed procedural and collective agreements for years. He was referred to a procedural agreement signed in 2011 between Co-Respondent and the bank and he agreed that "B5" stands for the AVP grade and "B6" is the VP grade. He conceded that as per section 2.4 of the Procedure Agreement signed in 2011, there must be

collective bargaining and a collective agreement setting out the terms and conditions of employment (for “B5” and “B6” employed by the bank). However, he did not agree that there should have been negotiations and agreement between the union and the employer before implementation of the impugned terms and conditions. He stated that in the light of the economic difficulty which the bank was facing, the bank had to take decisions. He referred to another section 3.2(7) of the same agreement which, according to him, allowed the bank to do so. He stated that in the collective agreement signed in 2018 it was mentioned that ‘discussion’ in relation to the said new terms and conditions was going to be continued. He accepted that there was no mutual agreement between the union and the employer on the new terms and conditions of employment. The new terms were however granted to those who were promoted after 2016. He agreed that there was a discrepancy between those benefiting from the terms and conditions under the collective agreement and the remaining 52% representing newly promoted officers as from 2016. He did not agree however that this was discrimination and he stated that there was a discrepancy and that the difference was the year of promotion and that this was something which is in fact done everywhere.

Mr Davis agreed that for the AVP grade there was one agreed set of terms and conditions and these are the conditions in the collective agreement. He did not agree that once the value of the job of the AVP had been agreed as set out in a collective agreement, it would be illegal to put the Disputants who were in the same grade of AVP, in the same bargaining unit outside of the collective agreement with lesser terms. He agreed that the collective agreement of 2013 was to end in September 2016 and after September 2016 up to until August 2018, there were still negotiations until a new collective agreement was signed in August 2018. Mr Davis agreed that individual contracts were used since between 2016 and 2018 there was no agreement. He did not agree that the terms and conditions as per a collective agreement should apply to all people within that bargaining unit. He also agreed that the Co-Respondent is still the bargaining agent for VPs and AVPs. In re-examination, he stated that the collective agreement of 2013 was effective until 1 September 2016. He suggested that the contracts granted in 2017 and the promotions are valid. He also referred to the new conditions which were applied to anybody who was promoted after 2016.

Mr Soobarah, Head of People and Culture at the Respondent deponed at another sitting and he stated that Disputant No. 3 signed her contract on 31 October 2016 and that same was not under protest and that there was no note indicating any sign of protest. He confirmed that the three disputants have unique roles in the bank. In cross-examination, he agreed that it was possible for a consultant to assess jobs of different nature with different functions as having the same value provided, he added that there was a solid methodology to do it. He agreed that employees in the AVP grade who benefit from terms and conditions under the collective agreement have 32 annual

leaves as compared to 22 for the Disputants and earn one tenth annual salary as end of year bonus compared to one twelfth annual salary for the Disputants. He did not agree that when the Disputants were in the lesser grade B4 they already enjoyed 32 days' leave annually after completion of five years' service. He however agreed that prior to being promoted in grade B4 the Disputants were enjoying one tenth annual basic salary as end of year bonus. Mr Soobarah stated that the business world has become very complex and that it has come to such a situation that even relationship managers, although they hold the same titles but because of the difference in complexity of their roles, cannot be put on the same terms. He did not agree that all the terms and conditions in the previous collective agreement prevailed until a new collective agreement superseded the previous agreement. He stated that in the collective agreement of 2013 it was provided that only one clause in relation to salary increase would survive. He agreed that clause 2.4 in the procedure agreement provides that when it comes to terms and conditions of "B5", that is, the AVP grade, the bank must negotiate with the union. He stated that the bank had to take a decision in the interest of the business but suggested that the bank was very much agreeable to discuss with the unions to find a solution as would be apparent from the collective agreement of 2018. In re-examination, he stated that there were 'informal talks' and an agreement that Counsel of the union and management would be talking to each other to try to find a solution.

A representative of Co-Respondent then deponed and he solemnly affirmed as to the correctness of the statement of case filed on behalf of Co-Respondent. He stated that the Co-Respondent has sole recognition to represent employees in the AVP and VP grades. There is a procedure agreement with the Respondent since 2011 and he averred that although the agreement has expired, tacitly it is still valid. He stated that, according to him, there was no gap between 2016 and 2018 since parties negotiated as soon as the 2013 collective agreement ended in 2016. This would be so, according to him, because any negotiation would be only for new terms and conditions of employment leaving, as we understand it, unchanged terms unaffected. He stated that it was not correct for management to negotiate with the employees individually regarding terms and conditions of AVPs and VPs. He stated that the level of work is defined by grades at the bank and that there is an assessment carried out by HR to determine whether a staff should be in a "B4", "B5" or "B6" position, for example.

The representative of Co-Respondent stated that though the bank had informed the union that the bank would proceed with the nomination of staff with lesser terms and conditions of employment, the bank never came with a proposal to negotiate with the union. The Co-Respondent chased the bank to come and negotiate and even lodged a case before this Tribunal (in November 2016 as per paragraph 11 of the Statement of Case of Co-Respondent). The Respondent then came before the Tribunal and

undertook to have meaningful negotiations with the union but unfortunately the bank never had any such negotiations. He also stated that the percentage of staff mentioned above (52%) work in both Segment A and Segment B. He averred that the claims of the Disputants were legitimate and that up to now the bank has had no negotiations with the union. In cross-examination, he stated that since he joined the bank it was always the case that what had been acquired following a collective agreement would remain. He maintained that there was no negotiation at all because there was no proposal emanating from the bank. He agreed that the Disputants signed their contracts of employment. He was aware of some measures taken by the bank to remedy its financial situation. He could not say however if the review of terms and conditions was done to contribute towards the professional growth of the employees and in order not to block their career path. He stated that the Benefits Guide included in the statement of case of Co-Respondent was circulated to the union or to the staff of the bank.

The Tribunal has examined all the evidence on record and the submissions of all counsel. The collective agreement signed in 2013 was for a duration of 3 years starting as from the Effective Date (which was 1 September 2013). The parties decided in their wisdom to provide at paragraph G of the said agreement the following:

#### *G. DURATION*

*1. Without prejudice to the generality and permanence of clause B(4) above, it is agreed by the Bank and the BBMSA that the present agreement shall be of a duration of 3 years starting as from the Effective Date.*

*2. For the avoidance of doubt, the Bank and the BBMSA hereby agree that the said clause B(4) above shall irrevocably and permanently survive termination of the present agreement.*

From the above, it is clear that the intention of the parties, save for the said clause B(4) mentioned, was for the 2013 collective agreement to be of a duration of 3 years and there is no evidence before us that the parties thereafter at any time agreed for the collective agreement of 2013 to continue after that period of time. Obviously, the agreement being a collective agreement, the obligations of the parties did not simply vanish on day one after the termination of the agreement. Thus, for instance employees in the bargaining unit who were already benefitting from terms and conditions as per the collective agreement did not simply lose those terms and conditions and would thus continue to benefit from their pay, leaves or other allowances until there was a new agreement, an award or other relevant intervening factor which brought changes to those terms and conditions. The Tribunal finds that the right of the recognized trade union to bargain freely with the employer in relation to terms and conditions of employment of employees in the relevant bargaining unit through

collective bargaining necessarily includes the right to negotiate for the renewal of any such collective agreement. The legislator has in its wisdom provided in section 55 of the Act when negotiation for the renewal of a collective agreement should start (section 55(3A) of the Act) whilst at the same time acknowledging that the collective agreement may itself specify a date for the start of renegotiation. As is clear from section 53(2) & (4) of the Act, the duty to bargain applies also for the renewing or revising of a collective agreement. The law goes further and in line with the international obligations of the country following the ratification of the Collective Bargaining Convention, 1981 (No. 154), the law imposes a duty to bargain in good faith. We may here, for example, refer to sections 112 and 113 of the Code of Practice (Fourth Schedule to the Act).

Thus, the parties to a collective agreement must refrain from doing any act that is likely to undermine the bargaining process. The parties must make use of the processes and avenues already provided for, say in the procedure agreement to find mutually acceptable solutions and to enter into an agreement as soon as possible.

In the present case, the procedure agreement existing between Respondent and Co-Respondent provides clearly at section 2.4 that subjects such as 'Leave Entitlement', 'Changes in employee benefits' and 'Changes to conditions of work' for grade B5 (AVPs) are matters for collective bargaining between Respondent and Co-Respondent. Thus, the intention of the parties was that there should be negotiation in relation to any of the matters mentioned in section 2.4 of the procedure agreement. The Co-Respondent made an application (letter dated 25<sup>th</sup> November 2016 as per Annexure 7 to the Statement of Case of Co-Respondent) before this Tribunal under section 53(5) of the Act for an order directing the Respondent to start negotiations. In that application letter, the Co-Respondent averred that the Respondent was taking unilateral decisions, implementing changes to the conditions of work and breaching the Procedural Agreement since new Terms and Conditions were being forced to internally promoted employees. The Respondent agreed to negotiate with the Co-Respondent as regards to the Terms and Conditions for AVPs and VPs. The Respondent averred that there were such negotiations and referred to a letter dated 17 January 2017 (as per Annex 2 to the Statement in Reply (to the Statement of Case of Co-Respondent) on behalf of Respondent) addressed to the Co-Respondent where the bank communicated its position on the issue of new Terms and Conditions of AVPs and VPs. The Respondent also referred to another "purported labour dispute" which the Co-Respondent would have referred to the Commission for Conciliation and Mediation (roughly one year before the signing of the 2018 collective agreement) and which included the issue in relation to the new Terms and Conditions of AVPs and VPs (Annex 3 to the same Statement of Reply of Respondent).

What is more important however in this particular case is that the Respondent and Co-Respondent eventually managed to sign another collective agreement on 3<sup>rd</sup> August



2018, effective as from the date of signature of the agreement. Section 15 in that new collective agreement reads as follows:

*“NEW TERMS AND CONDITIONS FOR INTERNAL PROMOTIONS AND EXTERNAL RECRUITS*

*15. This matter is being kept in abeyance until 31<sup>st</sup> December 2018 in order to allow further discussions between the Bank and BBMSA so as to determine whether the said New Terms & Conditions comply with all relevant provisions of the laws of Mauritius. A monthly update will be jointly submitted to the CCM, and in the event that there is no resolution and consensus by 31<sup>st</sup> December 2018, the parties will jointly refer the matter to the ERT or to any other approved/appropriate authority as agreed between the parties.”*

The Co-Respondent when signing the collective agreement in 2018 was already aware that new terms and conditions were being granted to internally promoted employees (vide application dated 25 November 2016 made to the Tribunal and correspondences from the Co-Respondent including Annex 7 to the Statement of Case of Disputant No 3). The Respondent and Co-Respondent agreed in the new collective agreement that the matter concerning the new terms and conditions be kept in abeyance until 31 December 2018 to allow further discussions between the Bank and BBMSA so as to determine whether the said new Terms and Conditions comply with all relevant provisions of the laws of Mauritius. There is no mention in section 15 above, that the parties reserved to right to bargain *stricto sensu* in relation to better or more favourable terms and conditions for internal promotions and external recruits. As per section 15 of the 2018 collective agreement, the crux of the matter was whether the new terms and conditions complied with the laws of Mauritius or not. More importantly, a procedure was laid down in case there was no resolution and no consensus by 31 December 2018. The parties were to jointly refer the matter to the Tribunal or to any other approved authority as agreed between the parties. The present cases however do not fall under section 15 of the collective agreement of 2018. No evidence has been adduced as to any such procedure contemplated following an absence of consensus reached between the relevant parties or no resolution of the issue. The present cases emanate from individual employees who have signed contracts with the Respondent in 2016 and 2017 and who then reported the disputes to the Commission for Conciliation and Mediation on 7 August 2019. This gives quite a different context to the issue raised which is absence of negotiations or failure to bargain with the relevant trade union (Co-Respondent) in relation to those new terms and conditions. The reasons put forward by the Respondent for coming with those new terms and conditions for all internally promoted employees and new recruits as from a certain cut off date has not been challenged on behalf of the Co-Respondent. It is unchallenged that these were

measures taken among other measures which included the closing of some ten branches of the bank and the selling of property belonging to the bank.

The main averment made by the Disputants, apart from the 2013 collective agreement, is that the new terms and conditions granted to them infringe the principle of 'equal remuneration for work of equal value'. Section 20(1) of the now repealed Employment Rights Act (post 2013 amendment) read as follows at the relevant material times (in 2016 and 2017):

*“Every employer shall ensure that the remuneration of any worker shall not be less favorable than that of another worker performing work of equal value.”*

The law has now changed, and the relevant provision, which is slightly different, is found at section 26(1)(a) of the Workers' Rights Act which provides as follows:

*“Every employer shall ensure that the remuneration of a worker shall not be less favourable than the remuneration of another worker performing work of equal value.”*

The Tribunal is of the opinion that this change would have no real bearing on our decision. The Tribunal had the opportunity to consider the then section 20(1) (but prior to its amendment in 2013) which existed under the repealed Employment Rights Act in the case of **Chemical Manufacturing and Connected Trades Employees Union And Compagnie Mauricienne de Commerce Ltée, RN 54/12**. The Tribunal had to consider, inter alia, the following dispute:

*2. That all employees forming part under the bargaining unit of the Union without excluding any new recruits should benefit from one Saturday off after having worked for the precedent Saturday which results from one Saturday at work and one Saturday off and thereon repeatedly.”*

The Tribunal stated the following:

*“In Constitutional law, the principle of equality is not absolute but subject to limitations. In the case of Police v Rose 1976 MR 79, the Supreme Court observed that “Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently.” Their Lordships in the case of Matadeen and Anor v Pointu and Ors (Privy Council) 1997 PRV 14 cited with approval the above and referred to same as one of the building blocks of democracy. The Tribunal thus finds that similarly section 20 of the Employment Rights Act does not create an absolute right for equal remuneration but must be read as being subject to there being a valid reason for two workers to be treated differently.*

*This is in line with French and English case law. Under French law, the Court (“Cour de Cassation”) has accepted a number of circumstances which could justify the non-*

application of the principle of “à travail égal salaire égal”. These would include for instance “la décision justifiée par “des considérations liées à l’intérêt de l’entreprise” (Corrignan-Carsin Danielle, “Un nouvel embauché n’est pas fondé à invoquer une violation du principe “à travail égal, salaire égal”, des “raisons objectives” justifiant la différence de rémunération”, JCP 2006, éd. G, n° 5, II, 10017), « une différence pour éviter la fermeture d’un établissement » (Soc., 21 juin 2005, n° 02-42.658, Bull. 2005, V, n° 206) and personal qualities (‘the personal equation’) of the workers concerned such as « l’expérience professionnelle acquise » (Soc., 29 septembre 2004, n° 03-42.033, Soc ; 15 novembre 2006, n° 04-47.156, Bull. 2006, V, n° 340 ; Soc., 19 décembre 2007, n° 06-44.795) or « une différence de compétence reconnue de manière transparente » (Soc., 17 octobre 2006, n° 05-40.393). The circumstances will be analysed “in concreto” by the Court to decide upon the relevance of the reason/s given. In his report to L’Arrêt n° 574 du 27 février 2009 - Cour de cassation - Assemblée plénière, Mr Mas, « conseiller rapporteur » wrote :

« Au fil du temps la Cour [meaning « la Cour de Cassation »] a même augmenté ses exigences, puisqu’elle a dans un premier temps exigé des justifications objectives, puis des justifications objectives et pertinentes et enfin que ces justifications soient appréciées “in concreto” par le juge, qui doit en contrôler concrètement la pertinence. »

Under English law, the principle is found in the Equal Pay Act and Sex Discrimination Act. We need not go in detail in the relevant provisions but suffice it to say that variation in treatment in the sphere of employment must be genuinely due to a material difference between each relevant worker’s case. In *Rainey v Greater Glasgow Health Board* [1987] IRLR26 HL, the House of Lords ruled that an employer has to show “objectively justified grounds” for the difference in pay.”

The Tribunal then went on to analyse the particular facts in that case before making its award.

In the present case, it is not disputed that each of the disputants though in the same AVP grade is performing unique roles at the bank. Also, since the disputants have been promoted in November 2016 (for Disputant No. 3), July and August 2017 (for Disputant No. 1 and 2 respectively), their experience in their posts and in the AVP grade cannot be compared with other officers who have been in the AVP grade for much longer.

Unchallenged evidence has also been adduced that the Disputants were all working in the Segment A and were paid from the Segment A payroll. There is evidence that both the Bank of Mauritius and the Mauritius Revenue Authority impose that the bank should have separate accounting systems and processes for decision making concerning Segment A and Segment B. There is also unrebutted evidence that Segment A which employs about 85% of the staff of the bank has been as from 2010 a struggling

business. Evidence was adduced that Segment A was loss making whilst Segment B (serving non-resident customers) was profitable. Mr Davis stated that the bank could not continue looking at a Strategic Business Unit which was continuously making losses and they had to take decisions. He explained the strategies put in place by the bank and which included 'Cost Control'. The Respondent thus closed ten branches in the last ten years and even sold properties which it owned. He added that because staff cost at one point in time accounted for more than 65 or 70% of the bank's total cost, the issue of staff cost had to be tackled. However, he stated that since his colleagues were the talents of Respondent, the Respondent did not want to take tough decisions and instead wanted to preserve jobs. Also, he averred that the Respondent ensured that the AVPs and VPs were paid appropriately against their peers in the market. Mr Davis stated that his colleagues are remunerated better 'on a total package' compared to employees in other banks. He stated that things improved with measures taken even though he hinted to things worsening yet again following the Covid-19 pandemic.

He also explained that realigning the terms and conditions now among the staff will not amount to a one-off payment for the bank but will continuously affect its financial situation. He added that the Respondent will then have to review the future of its Segment A business in Mauritius. None of this evidence has been seriously challenged and in fact even Disputant No. 3, when asked if she agreed that the bank is more profitable because of certain actions taken, stated that she guessed a lot of strategies were in place since the last few years. It has been specifically provided in the Statement in Reply filed on behalf of Respondent (in reply to the Statement of Case of Co-Respondent) at paragraph 7a that Segment A was loss making in 2010, 2012, 2013, 2014 and 2015 and that this prompted Respondent to adopt a number of measures starting as from 2015 to reduce its cost. The loss is substantiated by copies of extracts of or notes to financial statements of Respondent as annexed to the Statement in Reply (Annex 1). As per paragraph 14f of the Statement in Reply of the Respondent (in reply to the Statement of Case of the Disputants), the Respondent took a series of measures to ensure the sustainability of its business model including a reduction over the years of staff costs as a proportion to total costs.

The Tribunal notes that as per the Statement of Case of the Co-Respondent (paragraph 11) there was an application made before the Tribunal by the Co-Respondent against the Respondent under section 53 of the Act and though Respondent agreed in front of the Tribunal that it would negotiate, the Respondent allegedly never engaged with the Co-Respondent to discuss about the impugned terms and conditions. However, and very importantly, the parties have been able to sign a new collective agreement on 3<sup>rd</sup> August 2018 (Doc E). Apart from section 15 already quoted above, the relevant provisions in that agreement read as follows:

*PREAMBLE*

3. The parties acknowledge that during the negotiations which have resulted in this Agreement, each party had full opportunity to make representations and proposals with respect to any of the disputes or matters herein set out and that the understandings and agreements arrived at by the parties after such exercise are set forth in this Agreement. Therefore, the Bank and BBMSA voluntarily and unreservedly state that they shall not be obligated, throughout the duration of the Agreement, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement and all claims for the period September 2013 to September 2016 are fully settled. This article shall not be construed in any way as to restrict the parties from commencing negotiations under the applicable law or any succeeding agreement to take effect upon the termination of this agreement.

...

#### 6. DURATION

This Agreement shall become effective upon signature by BBMSA and the Bank. It shall remain in effect until 30<sup>th</sup> September 2020.

...

#### 8. SALARY INCREASE

The Bank, has agreed to pay to all its employees in the AVP and VP grades who are in its employment as at the date of signature of this agreement, an increase in the basic salary as follows:

##### VP Grade

Salary Band as at 31 July 2018	Increase Amount (Rs)
Rs130,000 to Rs150,000	Rs2,500
Rs150,001 to Rs200,000	Rs1,500
Above Rs200,000	NIL Increase

##### AVP Grade

Salary Band as at 31 July 2018	Percentage Increase
MUR75,000 – MUR78,485	Average increase of 10.8% (to be brought to a minimum of MUR85k)
MUR78,486 – MUR94,402	8%
MUR94,403 – MUR96,887	6%
Above MUR96,887	3%

Note: 1. ...

4. External recruits at the AVP grade who have been in the employment of the Bank for a period of less than one year from the date of signature of this Agreement and who are already earning the new minimum salary as prescribed above would not be entitled to the increase set out above.

(...)

Note 4 under section 8 above is interesting in that an employee in the AVP grade concerned by this Note will not benefit from the salary increase at section 8 of the collective agreement even though he or she would presumably be in the same bargaining unit consisting of AVP and VP grades. This is the agreement between the Respondent and Co-Respondent, and we have no issue concerning same. The Tribunal understands that a cutoff period had to be decided somewhere and agreed upon between the parties. None of the Disputants are however concerned with this Note. Section 8 also reveals that within the AVP grade only, there is a wide salary range and different rates of salary increases are provided according to salary ranges determined by the Respondent and Co-Respondent.

The Respondent should have engaged in collective bargaining with Co-Respondent before including the new terms and conditions in the individual contracts signed with the Disputants. However, in the light of the particular facts of the present matter including the new collective agreement reached after the individual contracts signed in 2016 (Disputant No. 3) and in 2017 (Disputants Nos. 1 and 2) and the valid and unchallenged explanations put forward by the Respondent to justify the implementation of several measures including reduction of staff cost, the Tribunal finds nothing wrong that the Disputants are being granted new terms and conditions similar to any other employee promoted or recruited as from 2016 in the AVP grade at the Respondent.

The Tribunal wishes to highlight that if ever it proceeded to extend the duration of the 2013 collective agreement beyond the agreed period of three years, this would have been contrary to the principles of free collective bargaining. Indeed, the crux of collective bargaining is for management and the relevant trade union/s to bargain freely. In this case, the Respondent and the Co-Respondent freely agreed that the 2018 collective agreement was to start as from the signature of the agreement and not at any other date prior to that. The Tribunal cannot go against this. The Respondent and Co-Respondent addressed their minds to the issue of new terms and conditions for internal promotions and external recruits and agreed to section 15 (see above) which provides that “the matter is being kept in abeyance until 31<sup>st</sup> December 2018 in order to allow further discussions between the Bank and BBMSA so as to determine whether the said New Terms & Conditions comply with all relevant provisions of the laws of Mauritius”. Thereafter, the steps which were to be taken (and which were not taken) should there still be no resolution or consensus on the matter by the 31<sup>st</sup> December 2018, were agreed between Respondent and Co-Respondent.

The relationship between individual employment contracts and collective agreements often raises quite several issues. The cardinal principle is as per the judgment in the

case of **State Bank of Mauritius Limited v A.Jagessur 2008 SCJ 8**, where the Supreme Court stated the following:

*It is important to note that contract negotiation and conclusion has remained a matter of individual choice. However, where there is a collective agreement, it creates a “régime de travail” where individual choices are relegated to collective choice. As Répertoire Travail Dalloz, Conventions et Accords (Régime Juridique), paragraph 97 states:*

*“Définissant un régime de travail, la Convention ou l’accord collectif du travail a, notamment, pour objet de fixer les conditions auxquelles doivent répondre les contrats individuels de travail.”*

In the present case, the Respondent and Co-Respondent agreed that the collective agreement of 2018 shall become effective much after the previous collective agreement came to an end. The Co-Respondent was very much aware of the issue of individual contracts and a provision was included in the new agreement (section 15) to cater for this. It was no longer an issue of collective bargaining and the issue was more a determination as to whether the new terms and conditions complied (or did not comply) with all relevant provisions of the laws of Mauritius. By adopting such an attitude and irrespective of its stand prior to the 2018 collective agreement, the Co-Respondent contented itself to leave the destiny of the new terms and conditions solely to a decision as to whether the new terms and conditions of employment complied with the laws of Mauritius. There is no dispute that the impugned new terms and conditions formed part of the individual contracts signed by the Disputants and there is no averment of any “dol”, “erreur”, or other “vice de consentement” which would have affected the said contracts. The previous collective agreement had already come to an end and the Respondent and Co-Respondent agreed that the new one would not coincide or start just after the previous one. This was the agreement of the relevant parties. In the circumstances, the Tribunal cannot find that the individual contracts of employment entered did not comply with the laws of Mauritius. There was indeed no collective bargaining on these new terms and conditions, and whilst this is intrinsically wrong and against the principles of good employment relations, the events as they occurred subsequently with the signing of a new collective agreement where increases in salary, *inter alia*, were granted (see above), the manner in which section 15 of that agreement was drafted, the absence of any evidence of action taken post 31 December 2018 under section 15 of the new collective agreement and so on, must also be considered.

If the relationship between the individual contracts and the collective agreement is already taken care of by way of section 15 of the 2018 Collective Agreement, the Tribunal finds no reason to intervene when the procedure provided in that section in case of absence of consensus was not adopted.

Also, the terms of the Acceptance which the Disputants signed (in 2016 for Disputant No. 3 and much later in 2017 for Disputants No. 1 and 2) are clear and not ambiguous and read as follows:

*“Acceptance*

*In accepting this Agreement, you confirm that all information provided by you to us in connection with this offer (including at interview) is true and not misleading. (...)*

*The Company is committed to offering competitive and sustainable remuneration to all of its employees. By agreeing to the terms and conditions set out in this contract, you acknowledge and accept the principle that the remuneration provided for in this contract may be different to the remuneration provided for in relation to existing and future employees of the Company of the same corporate grade as you.*

*By accepting this offer, you agree to be bound by the terms of your Agreement. This includes the Summary of Key Terms, any applicable Schedules and the enclosed Detailed Terms and Conditions. Your Agreement sets out the complete and exclusive agreement between you and the Company and supersedes all proposals or prior agreements, oral or written and all other communications between the parties relating to the subject matter of this Agreement. In the event of any conflict between the Summary of Key Terms and any applicable Schedules and the Detailed Terms and Conditions, the Detailed Terms and Conditions will prevail. In addition, by accepting this offer you will be deemed to confirm that you have received, read, understood, agree and will comply with the requirements detailed in the Detailed Terms and Conditions.*

*(..)*

*I have read, understood and agree to the terms of the Agreement (including the terms set out in any applicable Schedules and the Detailed Terms and Conditions section).”*

For all the reasons given above, the Tribunal cannot go against these contracts of employment the more so that this is not a dispute jointly referred to us by the Co-Respondent and the Respondent as provided for under the collective agreement of 2018 in the event that there was no resolution and consensus on the matter by 31<sup>st</sup> December 2018, and that there is no evidence either that such a dispute was ever contemplated. Also, it is agreed that the Disputants perform unique roles at the bank. Other employees who joined the AVP grade before the Disputants have more experience than any of the Disputants in the grade of AVP. And, very importantly, the reasons put forward by the Respondent requiring it to take the various measures including the closing of numerous branches across the island and the reduction of staff cost have not been challenged. There was mention of the urgency of the situation, a real financial need and the wish to preserve jobs since the employees of the bank are in



fact the 'talents' of the Respondent. All of this is not seriously challenged before us. For all the reasons given in this award, the dispute is thus set aside.

**SD Indiren Sivaramen**

**Acting President**

**SD Francis Supparayen**

**Member**

**SD Rabin Gungoo**

**Member**

**SD Kevin C. Lukeeram**

**Member**

**10 February 2021**