

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 91/22

Before

Indiren Sivaramen	Acting President
Raffick Hossenbaccus	Member
Abdool Feroze Acharauz	Member
Parmeshwar Burosee	Member

In the matter of:-

Mr Dharmarajen Pillay Valoo (Disputant)

And

Mauritius Shipping Corporation Ltd (Respondent)

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(9)(b) of the Employment Relations Act, as amended (hereinafter referred to as “the Act”). Both parties were assisted by Counsel. The terms of reference of the point in dispute read as follows:

“The Respondent’s unfair, unjustified and discriminatory refusal to allow the Disputant to retire under a Voluntary Retirement Scheme. Instead the Respondent approved a normal retirement for the Disputant when such a request was never made by the Disputant. The Disputant’s entitlement to be refunded all his leaves.”

Disputant deposed before the Tribunal and he solemnly affirmed as to the correctness and truth of the contents of his Statement of Case. The Disputant identified the annexes to his Statement of Case and formally produced these before the Tribunal. He stated that the Voluntary Retirement Scheme (VRS) is as per the conditions of service and that anyone at the Respondent who is eligible for same can apply for retirement under the VRS. When asked by his counsel if he had applied for early retirement or for VRS in his letter dated 10 January 2022 (Doc B), he stated that they work together and as per the conditions of service, if one is to retire (as in his case), one has to retire under the VRS.

He stated that he was asked to do all the necessary handing overs though his request for retirement under the VRS had not yet been approved. He was later informed by way of a letter dated 20 April 2022 (copy marked Doc F) that the board had not acceded to his request for “voluntary retirement benefits” but instead had approved his normal retirement. Disputant suggested that he never made any request for normal retirement. He stated that he had already replied to the letter dated 20 April 2022 (Doc F) when he received a letter dated 25 April 2022 informing him that clause 5.38(iv) relating to the VRS in the 'Review of Pay and Organisation Structures and Conditions of Service' (Doc L) had been waived. He suggested that the then Managing Director informed him that he had already recruited a Manager and could not have two Managers in one department. He stated that it was one Mr Bheecarry who had been recruited well before he received the letter dated 20 April 2022 from the Respondent. He stated that since no compromise could be found between the parties, he referred the matter to the Ministry of Labour, Human Resource Development and Training. There, the matter was supposed to be heard on 30 June 2022, but it was postponed at the request of management to 28 July 2022. He stated that at the request of the then Managing Director, he did not attend duty during the time that the matter was before the Ministry. He stated that he felt he was being pressurized to provide a departure date and that the then Managing Director wrote to him requesting for a departure date although the case was then before the Ministry of Labour, Human Resource Development and Training.

Disputant suggested that no reason was given to him as to why his request for VRS had been turned down. He was only informed that it was at the Board's discretion. He averred that as per a document allegedly prepared by the HR Department (which is contested on behalf of the Respondent), his VRS would have costed Rs 3,425,141.55 if Respondent had agreed to him retiring with VRS benefits. He suggested that as per the audited accounts of the Respondent, the latter registered profits in excess of Rs 221 millions for the year ending 30 June 2021. Copies of Consolidated Financial Statements for the periods ending 30 June 2021 and 2022 (Docs N and O respectively) were produced. There was no objection for him to produce the document purporting to be a calculation of his VRS benefits if VRS had been granted to him (Doc P). He also produced a document emanating from the Respondent where he would have been paid a sum in excess of Rs 600,000- for refund of his leave benefits (Doc Q). He stated that he did not attend duty as from 22 June 2022 until his last date at the Respondent on 28 July 2022, and that this was at the request of the Managing Director. He stated that he was entitled to 30 days annual leaves and 21 sick leaves for one full year. He produced a copy of a document dated 26 January 2022 (Doc R) pertaining to his balance of leaves. He suggested that Respondent had wrongly prorated his leaves for 2022 so that he was allowed only 12.25 sick leaves and 17.5 annual leaves (prorated on the basis of 7 months) for the year 2022. He stated that the period he did not attend duty as from 22 June 2022 was deducted from his leave entitlement for the previous year 2021.

The Disputant was later cross-examined on the provisions concerning the VRS as per section 5.38 of the 'Review of Pay and Organisation Structures and Conditions of Service' dated October 2017 (Doc L). Disputant suggested that he was requested on 22 June 2022 by the then Managing Director not to attend duty until his case was heard at the relevant Ministry. He did not recall the exact number of days he attended duty in 2022 but he did not have any issue to rely on figures emanating from the Respondent whereby it was mentioned that he took 24 sick leaves and 23 annual leaves. He stated that when his VRS was not approved, he had to be hospitalized. Disputant agreed that in the letter dated 4 February 2022 emanating from Respondent (Doc D), it was mentioned that it was for the Board to decide on the request made. He mentioned that three officers would have been granted the VRS at the Respondent. He stated that he chose to insist on retirement with VRS benefits even after he was informed that he would not get the VRS and had to decide whether he would retire or not. He was also referred to a letter dated 24 May 2022 where he was again requested to inform the Respondent whether he would opt for early retirement or continue in his employment. He stated that his position was to request Respondent to reconsider his retirement under the VRS.

The Disputant was further cross-examined at another sitting of the Tribunal on averments he made in chief including in relation to a new vessel of the Respondent which is under construction, the chartering by Respondent of the vessel "Black Rhino", rebate granted on the cost of freight for Rodrigues and ratios such as gross profit margin, operating profit margin and net profit margin. The Disputant did not agree that the Respondent was entitled not to grant his VRS application in the light of the fragile situation of the company. Disputant was not agreeable with his leaves having been prorated for the last year. He did not agree that the board was perfectly entitled to reject his application for VRS. He stated that his understanding was that his application would be granted since all employees who had requested for VRS have been granted the VRS. He however conceded that even in July 2022 he was given the opportunity in writing to decide not to proceed to retirement. Disputant maintained that the then Managing Director had allegedly informed him that someone had been recruited to lead the Agency Department, and that he should not attend duty pending the hearing of the case before the Ministry of Labour, Human Resource Development and Training.

A Human Resource Officer then deposed on behalf of the Respondent and she confirmed that Disputant, as Manager, was entitled to 21 sick leaves and 30 annual leaves. She stated that an application for VRS is discretionary and the board has a discretion to accept or reject such an application. When questioned as to paragraph 5.38(v)(a) of the 'Review of Pay and Organisation Structures and Conditions of Service' (Doc L), she added that the board has a discretion as to the quantum of the gratuity to be paid. She then stated that as at 1 January 2022, Disputant had a balance of 110 sick leaves and 60 annual leaves. During the year 2022, the latter took 24 sick leaves and 23 annual leaves. The

Human Resource Officer explained that since Disputant retired on 28 July 2022, his annual leaves and sick leaves were prorated for the year 2022. Since Disputant had taken more leaves than his prorated entitlement for 2022, corresponding leaves were deducted from his balance of leaves. She stated that the calculation of the payment of sick leaves to Disputant was as per the 'Review of Pay and Organisation Structures and Conditions of Service' (Doc L).

The Human Resource Officer stated that a decision was taken by the board in March 2022 to freeze the VRS clause in the 'Review of Pay and Organisation Structures and Conditions of Service'. She stated that the three persons mentioned in the Statement of Defence of Respondent were granted VRS in 2017, 2018 and 2020. She stated that there was no automatic grant of VRS but that it was the board which decided whether VRS should be granted or not. She also referred to Mr Bheecarry who was already a former employee of the Respondent and who joined Respondent anew on 11 April 2022 as Assistant Manager on a contractual basis for one year. She stated that the latter submitted his resignation on 14 July 2022 and the latter's last date at the Respondent was 15 August 2022. The officer was then questioned on the letter dated 10 January 2022 (copy marked Doc B) emanating from Disputant. The officer stated that Doc P was not the template that Respondent uses to calculate leave balances and also that Doc P bore figures which did not reflect the actual situation. She stated that the document was not in the records of the Respondent and that figures on their template are calculated by the HR and Finance Departments so that ultimately there would be around five persons who would sign or initial on the relevant document.

The Human Resource Officer stated that the funds for the VRS do not come from the pension fund which the Respondent has with a third party for his employees. The Respondent alone has to pay for the VRS. She stated that the Respondent was in a fragile financial situation when the decision was taken in the case of the Disputant.

At another sitting, she stated that the Disputant was requested in writing on three occasions on 25 April 2022, 24 May 2022 and 11 July 2022 (Docs G, S and T) to inform Respondent if he would opt for early retirement or continue with his employment. She stated that four persons have asked for VRS and there was one refusal, that is, in the case of Disputant.

In cross-examination, the Human Resource Officer stated that the Respondent has treated the letter of Disputant (Doc B) as consisting of two separate requests, that is, one for VRS and one for early retirement. When confronted with Doc D, she however accepted that management had therein considered the application of Disputant as consisting of only one request for early retirement under the VRS and not two requests. She accepted that the VRS was not yet frozen when Disputant made his request to retire under the VRS. She stated that it was for the Board to decide ultimately whether to accept

a request for VRS. She stated that the Board must first approve the request for VRS, then the figures are calculated by the HR Department, cross verified by Finance Department and ultimately signed by HR, Finance and the Managing Director. She suggested that no computation of benefits is done prior to the submission of a request for VRS to the Board. She agreed that the Respondent did not state in any correspondence that the request of Disputant for VRS had been turned down because of financial reasons. When asked where the conditions of service provided for the prorating of leaves, she stated that same was not provided for in the conditions of service. When it was put to her that the Respondent was representing to Disputant in Doc G that his leaves would not be prorated, the Human Resource Officer stated that she would not be able to reply to same. However, she did not agree that the Respondent wrongly calculated the leaves entitlement of the Disputant. Also, she did not agree when it was put to her that granting Disputant benefits under the VRS would not have fragilised the financial stability of the Respondent.

The Finance Manager of Respondent deposed at yet another sitting of the Tribunal and he explained the process at the Respondent when there is a request for VRS. He confirmed that he did not process any VRS calculation for the Disputant in the Finance Department. He stated that the financial position of Respondent was fragile because (1) of the construction of a vessel costing more than Rs 850,000,000 for the Respondent in China, (2) of the chartering of a vessel for the transportation of cargo to and from Rodrigues where there had been a significant increase in 2022 in the daily charter hire rate and (3) of the funding of a budgetary measure concerning 20% freight rebate starting as from June 2021 on the transport of cargo to and from Rodrigues. He confirmed that Docs N and O were audited accounts as per the records of the Respondent. He explained that for the new vessel only part-payments which had already been made which were included in the financial statements of Respondent and not the full contractual liability of Respondent. He also referred to ancillary costs associated with the construction of a vessel such as modification costs, insurance, acquisition costs for new containers, payments to project coordinator and so on and which would be over and above the cost he mentioned for the new vessel. He agreed that both the financial statements for the years ending June 2021 and June 2022 (Docs N and O respectively) show positive gross profits but he averred that there was a decrease in profitability year by year since 2019. He also deposed on the gross profit margin, operating profit margin and net profit margin for the financial years 2019-2020, 2020-2021 and 2021-2022. He stated that there was a downward trend over these years which was apparent from all the three methods mentioned above.

The Finance Manager stated that he also acts as Company Secretary occasionally and he confirmed that the request of the Disputant to retire from his position as Manager and to ask for VRS was placed before the Board of Respondent. He stated that one has to

look at a number of years to reasonably assess the profitability of a company and not at merely two consecutive audited financial statements. In cross-examination, he was questioned in relation to the reasons he gave to explain the decrease in profitability of the Respondent over the years. He stated that the Respondent provides essential services to the outer islands. He stated that he has not done any calculations to establish how much it would have cost the Respondent if VRS had been approved for Disputant. He however stated that the Respondent would have been able to pay in March 2022 the amount which was put to him by counsel, though the Respondent would then have had to cut other expenses.

The Tribunal has examined all the evidence on record including the submissions of both Counsel. The VRS in the present case is provided under paragraph 5.38 of the 'Review of Pay and Organisation Structures and Conditions of Service' of October 2017 (Doc L) which reads as follows:

5.38 We recommend that the Voluntary Retirement Scheme, as hereunder, should apply in the MSCL, as from a date to be determined by the Corporation:

- (i) for eligibility, employees should be aged 50 and above. However, this age criterion is not applicable to APPT employees;**
- (ii) all eligible employees should be given the right to opt for the scheme except those who are subject to a disciplinary case or sanction;**
- (iii) the option would take effect three months as from the date it has been exercised or otherwise would lapse;**
- (iv) the Corporation should maintain its right to accept or reject an application for early retirement;**
- (v) upon retirement under the VRS, the employee (office staff and APPT) should be paid:**
 - (a) a gratuity equivalent to three weeks' remuneration for every period of 12 months' continuous employment. However, the Board may grant up to one month's remuneration on a case to case basis. For APPT employees, the compensation should be pro-rated according to the number of hours worked per week;**
 - (b) any balance of unutilised sick leave held, whether in bank or for the current year entitlement, should be refunded in cash at the rate of 1/22 of monthly salary per day;**

(c) any balance of unutilised Annual Leave should be refunded in cash at the rate of 1/24 of monthly salary per day; and

(d) end of year bonus on a pro-rata basis.

The evidence suggests that the Disputant retired at the age of 51. He made an application in a letter dated 10 January 2022 (copy marked Doc B) and the main part of his application read as follows:

10 January 2022

*The Managing Director
Mauritius Shipping Corporation Ltd.
2nd Floor, Capitainerie Building
Port Louis*

Dear Sir,

Voluntary Retirement – D. (Seeven) PILLAY VALOO

27 January 2022 will mark my 30 years of service at Mauritius Shipping Corporation Ltd (MSCL). I have, during my tenure with MSCL, successively & successfully occupied the functions of Junior Shipping Clerk, Shipping Clerk, Shipping Officer, Shipping Operations Supervisor, Asst. Operations Superintendent, Business Development Manager, Ag. Chief Manager and currently Manager of the Ship Agency Services Unit.

During my time at MSCL, I have been fortunate enough to accomplish many career goals. MSCL has given me the best opportunity to learn and grow as an individual and as a professional in the shipping industry.

However, for personal reasons, I wish to retire from the position of Manager and take the Voluntary Retirement Scheme (VRS) provided by the company. I would kindly request that the management considers 5 weeks per year of service together with any other associated benefit for the VRS compensation.

I plan to stay with MSCL till 15 February 2022 to give adequate time for a proper handing over and any training to my successor and also ensuring a smooth transition. I trust that MSCL Management will respect my decision and will approve my VRS and allow me to leave at the scheduled date.

I will miss being part of our team and the company. I trust that the good working relationships & friendships I have developed here will last well into the future.

I would like to express my appreciation for the opportunities I have been given at the company during my 30 years of service and seize this occasion to wish you all the very best for the future.

Yours faithfully,

D. (Seeven) PILLAY VALOO
Manager, Ship Agency Services

CC: The Permanent Secretary – Ministry of Blue Economy, Marine Resources, Fisheries and Shipping

Much evidence has been adduced as to the sequence of events as from when Disputant made his application until he was eventually informed that his request for VRS had not been accepted by the Respondent. He was then, very importantly, given the opportunity formally on no less than three occasions to decide what he wanted to do given that his request for VRS had not been granted. Knowing well that this was the case, the Disputant nevertheless decided to go ahead with his retirement. The decision to retire was always that of Disputant and the Tribunal has not been impressed that the Disputant was pressurized to retire or forced in any manner whatsoever to retire. The Disputant had the right to opt for VRS but the decision whether to accept or reject an application for early retirement under the VRS was always that of the Board of the Respondent. The Respondent has averred in its Statement of Defence that it is entitled not to unduly jeopardise its financial stability by accepting a VRS request. Evidence has been adduced that though the Respondent was making profits, there had been a constant decrease in the profitability of the Respondent over the years mentioned. This is not challenged before us. The Tribunal certainly cannot substitute itself for the Board of the Respondent when as per the relevant terms and conditions of service, the Respondent had a right to accept or reject an application for early retirement under the VRS clause. In this case, the board even waived this right but exercised its discretion not to grant benefits under the VRS which scheme was from then on frozen. It was up to the Disputant in the circumstances to decide what he wanted to do. This is not a case where the application for Disputant was refused but another or other application/s made on or around the same time as or subsequently to the application of Disputant was approved.

The three requests made under the VRS and which have been accepted in the years 2017, 2018 and 2020 do not suggest that the application made by Disputant for VRS should thus necessarily have been approved. In the light of the terms of reference before us, the Disputant has the burden to show on a balance of probabilities that the refusal to allow him to retire under the VRS was unfair, unjustified and discriminatory. To be discriminatory, the refusal must be based on one of the 'prohibited' grounds like caste, colour, creed and so on, and in this particular case there is no averment as to the ground

on which Disputant would allegedly have been discriminated against. The mere fact that Disputant has not been granted VRS in 2022 when three other officers have been granted VRS in 2017, 2018 and 2020 is not enough to constitute discrimination. Each application must be considered on its merits and a substantial decrease in profitability, for example, may be a plausible factor for an employer to consider when deciding whether to accept or reject an application for VRS or more radically whether to bring an end altogether to the VRS itself.

The Tribunal has analysed carefully all the evidence on record including the chronology of events and the evidence adduced in relation to the handing over of the laptop and sim card, the request for all in/out emails to be copied to the relevant departments/offices and the appointment of the said Mr Bheecarry, and the Tribunal finds that there is nothing which showed that Respondent was committing itself or representing to Disputant that it was going to accept his early retirement under the VRS. The Respondent, whilst requesting Disputant to prepare meanwhile a proper plan regarding transfer of knowledge, mentioned clearly in its letter dated 4 February 2022 (Doc D) that this was “(P)ending a decision from the Board”. The same letter made it clear that the request of Disputant would be submitted to the next meeting of the Board for a decision. In any event, even Disputant in his letter of 10 January 2022 (Doc B) stressed on the importance of a proper handing over even though there was no reply yet from Respondent in relation to his request. In the present case, when Disputant was informed in writing that his request for VRS had been turned down, he was still given the option in the circumstances to stay in office. Disputant chose to retire knowing well that it was not under the VRS. The Disputant had no automatic right for early retirement under the VRS neither when he made his application nor when the decision was taken by the Board of Respondent not to accede to his request for voluntary retirement benefits. The Tribunal has examined all the evidence on record and there is nothing to suggest that the decision of the Respondent was unfair or unjustified the more so that at the same time the decision was taken to freeze the VRS altogether. For all the reasons given above, the Tribunal is not satisfied on a balance of probabilities that the decision of Respondent to refuse to allow Disputant to retire under the VRS was unfair, unjustified or discriminatory in nature.

As regards the decision of the Board to allow the Disputant to exceptionally retire though he had not reached the age of sixty, this would be a decision exclusively within the province of the board of the Respondent and Disputant was always free to accept or to refuse same.

It is apposite to note that the application to retire from the position of Manager and take the VRS provided by the company was made in a letter dated 10 January 2022. The Tribunal will leave open the question whether the application or option was still valid and had not lapsed by the time Disputant reported the dispute to the Commission for Conciliation and Mediation. Indeed, sub-paragraph (iii) of paragraph 5.38 of the 'Review

of Pay and Organisation Structures and Conditions of Service' of October 2017 (vide Doc L above) provides the following:

(iii) the option would take effect three months as from the date it has been exercised or otherwise would lapse;

This leads the Tribunal to address a crucial issue in the present case as to what exactly the Disputant is seeking from the Tribunal in terms of an award. Indeed, the terms of reference as drafted do not contain any 'prayer' (at least for the VRS) or something which may be awarded by the Tribunal and be binding on the parties and which will be an implied term of the contract of employment between Disputant and Respondent (section 72 of the Act). Paragraph 21 in the Statement of Case of Disputant cannot be of much assistance in the present case in the light of the terms of reference, to which the Tribunal is bound failing which the Tribunal may deliver an award which is *ultra petita* (vide **S. Baccus & Ors vs. The Permanent Arbitration Tribunal, 1986 MR 272**). An award directing and ordering the Respondent to treat the Disputant's retirement as having been made under the VRS, either on its own or together with the second part of the terms of reference, that is an award to accordingly make the relevant and necessary adjustments and any relevant payment due to Disputant, besides being vague and open to further interpretation is well beyond the terms of reference before the Tribunal.

For all the reasons given above, the first part of the terms of reference, in relation to the VRS and the 'normal' retirement which was granted, is set aside.

As regards the refund of leaves, the Disputant has raised two issues which are as follows: (1) Respondent has prorated the number of sick leaves and annual leaves of Disputant for the year 2022; and (2) whether leaves allegedly taken at the request of the then Managing Director should be refunded to the Disputant. The last date of employment of Disputant at the Respondent was 28 July 2022 (as agreed by both parties - vide Doc W and following which retiring and other benefits were cashed) and the Respondent has prorated the number of sick leaves and annual leaves of Disputant for the year 2022. The Tribunal notes that section 5.18(vii) in the 'Review of Pay and Organisation Structures and Conditions of Service' (Doc L) refers to accumulated annual leave and not to balance of unutilised annual leave. From Doc R (which included a part referred to as "option form"), the Tribunal notes that an option must be exercised for annual leave not taken to be accumulated subject to conditions mentioned in the 'Review of Pay and Organisation Structures and Conditions of Service' (Doc L). As per section 5.18(ii) of the 'Review of Pay and Organisation Structures and Conditions of Service', the annual leave entitlement is provided for depending on eligibility in terms of years of service and grade in which the employee is. Also, that section specifically provides for the maximum number of days that can be refunded and section 5.18(iv) provides for the maximum number of annual leave that can be accumulated. Section 5.18(vii) of the 'Review of Pay and Organisation

Structures and Conditions of Service' refers to "accumulated annual leave" and not to unutilised days of annual leave. Since annual leave is a yearly entitlement, the Tribunal finds nothing wrong for such leave to be prorated in the present matter given the manner in which the 'New Leave Scheme' has been couched at sections 5.15 to 5.18 of the 'Review of Pay and Organisation Structures and Conditions of Service'.

Similarly, as per section 5.25(i) of the 'Review of Pay and Organisation Structures and Conditions of Service', sick leave is a yearly entitlement. Provision is made for unutilised days of sick leave to be accumulated to a maximum of 110 days in bank. Section 5.25(vi) of the 'Review of Pay and Organisation Structures and Conditions of Service' refers to the balance of accumulated sick leave which may be taken as pre-retirement/departure leave or encashed at the rate of 1/22 of monthly salary per day. No reference is however made to unutilised days of sick leave in that section.

The Tribunal thus finds that the prorating of annual or sick leaves for the year 2022 by the Respondent is not in contradiction with the provisions of the 'Review of Pay and Organisation Structures and Conditions of Service'. The Tribunal will deliberately avoid referring to relevant provisions of the Workers' Rights Act since the Industrial Court by virtue of section 3 of the Industrial Court Act would have exclusive jurisdiction to try any matter arising out of the Workers' Rights Act in so far as it does not relate to section 69A of the Workers' Rights Act.

Disputant has not challenged the number of days arrived at by the Respondent as the number of days during which Disputant was on leave (sick and annual leaves) except that Disputant contends that the then Managing Director would have asked him not to attend work as from 22 June 2022. This is challenged by the Respondent and apart from a letter emanating from Disputant himself, there is no reliable evidence that this was indeed the case. The Tribunal notes, for example, that as per the letter of 11 July 2022 (Doc T) emanating from the then Managing Director, the Disputant was still being requested in writing to inform the Respondent as to whether he would opt for early retirement or continue in his employment. Also, in Doc U (copy of letter dated 15 July 2022) the Respondent informed the Disputant of the following:

"As pointed out at the meeting, you were also requested to regularise all your leaves taken since February 2022, which tantamount to unauthorized leaves as at date. You were also requested to make necessary application for leave up to 25 July 2022 (now 28 July 2022), being the proposed date for the hearing of your case at the Ministry of Labour."

The Tribunal is not satisfied on a balance of probabilities that Disputant was formally required not to attend work, especially as from 22 June 2022, and if this was indeed the case, one would have expected Disputant to request or at least to have something in

writing to that effect from the Respondent. The Tribunal thus finds nothing wrong with the calculation of the leaves of the Disputant.

For all the reasons given above, the second and last part of the dispute is also set aside.

SD Indiren Sivaramen

Acting President

SD Raffick Hossenbaccus

Member

SD Abdool Feroze Acharauz

Member

SD Parmeshwar Burosee

Member

29 August 2023