

EMPLOYMENT RELATIONS TRIBUNAL

EXTENSION OF AWARD

RN 631

Before:

Rashid HOSSEN	-	President
Philippe Edward BLACKBURN	-	Member
Bulram TACOURI	-	Member
Renganaden VEERAMOOTOO	-	Member

In the matter of:

**Sugar Industry Labourers' Union (SILU) & Union of Artisans of the
Sugar Industry (UASI) – ‘**

And

**Cane Growers' Association (CGA) (*Respondent*)
&**

- 1. Mauritius Sugar Cane Planters' Association (MSCPA)**
- 2. Mauritius Co-operative Federation Ltd (MCFL) (*Co-Respondents*)**

Mr. A. Domingue, of Counsel, appeared for the Applicants

Mr. R. Montocchio, Q.C., appeared for the Respondent

Mr. L. Biefun, of Counsel, appeared for the Co-Respondents

(A) Statement of Case of SILU/UASI

On 10 January 2000, SILU and UASI (hereinafter referred to as the Applicants) had moved the then Permanent Arbitration Tribunal (hereinafter referred to as PAT), to extend to the whole of the Sugar Industry (SI), the Part Award of PAT dated 10 December 1999, published in the *Gazette* as General Notice No 2788 of 1999.

In that Part Award referred to above, PAT had granted, upon the Unions' request, against the Mauritius Sugar Producers' Association (MSPA), a staggering salary increase of 14%, to agricultural and non-agricultural workers of the SI in the employ of members of the Mauritius Sugar Producers' Association, to be implemented as follows:

- i) 10% as from the 01.12.1999
- ii) 2% as from 01.05.2000, and
- iii) 2% as from 01.12.2000.

In support of their request, the Applicants submitted the following arguments:

- (a) There should be uniformity of conditions of wages among all agricultural and non-agricultural workers of the SI.
- (b) Whether they work for large or small planters, workers of the SI perform the same type of work.
- (c) Several planters (large and small) had granted to their workers the 14% increase in wages, although they were not, then, a party to the dispute before the PAT. They quoted, at both extremes of the continuum, the Rose Belle S.E. Board (cultivating approximately 2 000 hectares of sugar cane or 4 738 *arpents*), and Trianon Estates Ltd (cultivating 32 hectares or 75.8 *arpents*).
- (d) The PAT had also delivered a Part Award on 23 August 1990, granting an increase of 18% to agricultural and non-agricultural workers of the SI employed by millers and large planters represented by the MSPA. The Unions had again applied to the PAT for an extension of that award to the whole of the SI. The Cane Growers' Association did not resist to that extension and the extension was granted.
- (e) The Applicants further submitted that when a '*Protocole d'Accord*' between the Unions and the MSPA was signed by parties concerned on 1 June 1994, thus improving the wages, fringe benefits and some conditions of service of SI workers of MSPA members, although the Cane Growers Association was not a party to that Collective Agreement, some of their members voluntarily adhered to it.
- (f) Finally, the Applicants drew attention to the fact that SI workers not covered by the Part Award under reference, and working for medium and small planters of the CGA and others, were very often *casual workers*, and therefore did not usually and automatically benefit from a '*panoply*' of fringe benefits accruing to regular workers of sugar millers and large sugar cane planters, members of the MSPA.
- (g) On the other hand, small and medium planters who employ agricultural and non-agricultural workers enjoy a wide variety of well-known and exhaustive fiscal benefits, subsidies, exemptions and financial assistance

from various institution and organisations catering not only for their welfare, but also assuring their continued growth, productivity and viability.

- (h) Last but not least, the Appellants recalled that the Government of Mauritius is signatory to the International Labour Office (ILO) Convention (No 100) pledging adherence to the principle of Equal Pay for Equal Work, as embodied in Part V Section 20 of the Employment Rights Act No 33 of 2008
- (i) In the light of the above submissions, the Applicants now request the Employment Relations Tribunal (ERT) to consider extending that Part Award of the PAT dated 10 December 1999, to the whole of the SI and with retrospective effect as from 1 December 1999, in the interests of terms and conditions of employment within the SI.

**(B) Statement of Case of the Respondent: CGA and Co-Respondents:
MSCPA and MCFL**

- (a) The Respondent (CGA) pledged that at no time it had been a party to the dispute between the Unions and the MSPA when the Part Award of 1999 (General Notice No 2788 of 1999) was implemented by members of that Association. It had neither been a signatory of the 1994 'Package Deal' or 'Protocole D'Accord' between the MSPA and the Unions. The CGA consequently submitted that the request of the Applicants (SILU and UASI) should be set aside by the Tribunal.
- (b) The Co-Respondents (MSCPA and MCFL) followed the same line of argument. They added that since they had not been asked to express their views then, it would be most unfair and against the law of natural justice to extend the said award to them. They added that if such was the case, "it would amount to a justified case of "Wednesbury" unreasonableness". In support of that submission, they summarised a quote from the Supreme Court judgment on the second part of the award relating to the 40-hour week:

"If those entitled to be heard have no right to know how a tribunal resolved the issues in dispute at the hearing, they may well regard as an empty ritual their legally conferred opportunity to be heard and to influence the tribunal by producing witnesses and other evidence to establish the relevant facts, advancing arguments on the proper exercise of any discretion and the resolution of any legal questions, and challenging their opponents' case. Unless the tribunal makes findings as to fact, explains the exercise of its discretion (by indicating the considerations that it has taken into account and relative weight assigned to them, for example) and gives its answers to any questions of law, there can be no assurance that the tribunal had discharged its obligation to base its decision upon the material presented at the hearing, rather than an extraneous considerations."

- (c) The Respondent and the Co-Respondents strongly objected to any change in the wage structure of the employees of their members on the ground that they were unable to sustain that additional financial charges as a result of the material and financial deterioration of their members' plantations. They both submitted a considerable amount of figures, charts, statistics, and comparative analyses, to draw attention to the widening gap between their members' financial situation, and that of the MSPA's as regards the 'capacity to pay' parameter. Comparative analyses concerning: acreage under cultivation, cane yields, cane varieties, sucrose content, rate of extraction, their members' share of the diminishing price of sugar under the UE's Sugar Protocol, and general increases in labour costs and miscellaneous supply and other charges were submitted.
- (d) However, in spite of the above, the Respondent (CGA) concluded that the request of the Applicants (SILU and UASI) should be restricted to planters having at least 500 hectares (*1 184.55 arpents*) of land under sugar cane cultivation.

(C) SUMMARY OF WITNESSES' TESTIMONY

- (1) **Mr. D. Ramjuttun**, Negotiator of SILU was examined by Mr. A. Domingue, Counsel for the Applicants, at the ERT sitting of 17/04/09, on his Union's update of the situation and the main reasons supporting the application of his Union.

Mr. D. Ramjuttun, recalled that:

- (a) Rose Belle S.E. Board and at least seven members of the CGA had voluntarily implemented the Part-Award of 1999, (granting a staggering increase of 14% on wages), although they were not bound to do so.
- (b) Trianon Estates Ltd, a member of the CGA, cultivating only 32 hectares of sugar cane, had voluntarily implemented the Part-Award. He, therefore, saw no reason why the other members of the CGA could not afford to do it.
- (c) The 1990 Award, involving the Unions and the MSPA, (granting an increase of 18% in wages), had also been extended throughout the industry. No party had, then, objected to that extension.
- (d) Export Duty on sugar had been abolished and a package of fiscal benefits was granted to sugar cane planters.

- (e) All workers of the sugar industry perform identical work and, therefore, work of equal value should have equal remuneration.
- (f) Though under the new legislation, he was aware that the Tribunal had the power to fix the coming into force of the extension of an Award, he was nevertheless asking that the extension of the 1999 Part-Award to have retrospective effect as from 1999.
- (g) He was not aware why Trianon Estate Ltd had voluntarily implemented the Part-Award of 1999.
- (h) Although the figures produced by the CGA were not at dispute, and in spite of the 36% reduction in the price of sugar as from 2009, of which he was aware, he did not believe that the implementation of the Part-Award by the rest of the sugar industry would ring the death bell of all those sugar cane planters.

(2) **Mr. Pierre Blackburn**, Secretary of the CGA, testified to the effect:-

- (a) Conditions of work on large sugar estates and at small planters' are totally different. MSPA members apply the Remuneration Orders (ROs) and the agreements contained in the 1994 Package Deal they signed with the Unions; whereas non-members of the MSPA apply only the ROs.
- (b) Some members of the CGA who have implemented the 14% increase granted in the 1999 Part-Award cultivate more than 500 hectares. The case of a few who cultivate less, like Trianon Estates Ltd, and who have also implemented the Part-Award is explained by the fact that they are managed by large sugar estates that are members of the MSPA.
- (c) The CGA have lost recently about ten members who have abandoned their cane plantations on account of financial difficulties. Not all members of the CGA benefit from fiscal incentives to which large planters of the MSPA and small planters enjoy. They are sandwiched in between. In addition, they have to give 22% of their annual sugar production to the millers.
- (d) A large proportion of the sugar industry has implemented the 1999 Part-Award, granting a staggering increase of 14% in wages to workers.

- (e) The thirty odd members of the CGA who had not yet implemented the Part-Award, cultivate between 3 and 200 hectares of sugar cane.
 - (f) The CGA did not object to the extension of the 1990 Award granting 18% increase in wages to sugar workers although its members then paid the export duty on sugar. Export duty on sugar was abolished in 1994. Members of the CGA, benefit in some sort from the package of fiscal benefits allowable to cane planters. Yet, their financial situation between 1990 and now (2009) had deteriorated.
 - (g) He had not thought it fit to work out the financial situation of the seven members of the CGA who have implemented the Part-Award of 1999 with the situation of the other thirty odd members who have so far refused to implement it. For the production of a proper comparative analysis, Mr. Blackburn added, this would have had to be worked out on a case-to-case basis.
 - (h) Workers employed in the sugar industry, as a whole, had gone down from about 46 603 in 1985 to approximately 7200 in 2007.
- (3) **Mr. Dineshing Goburdhun**, General Manager of the Mauritius Co-operative Agricultural Federation Limited (MCAFL), a third deponent before the Tribunal, was examined by M. Biefun, Counsel of Co-Respondents. He stated that:
- (a) The MCAFL had about 12 000 members, 90% of whom cultivated less than 2 hectares of cane lands. In the last ten years, membership has decreased by about 7000. The planters are neglecting their plantations; sugar no longer being their main bread-winner. Most of them are part-time planters.
 - (b) If the Part-Award was extended to MCAFL members, in five or ten years the small planters would disappear because they would be unable to bear the extra costs. They are already facing problems with the cost of production, including labour, fertilizers, and transport.
 - (c) As regard seasonal labour employed by MCAFL members, the price is not fixed by any award but following discussion and mutual agreement.

- (d) Members of the MCAFL implemented the 18% increase in wages of the 1990 Award to their workers because, in the first place, it was extended to the whole of the sugar industry. Secondly most of the members of MCAFL do not have full time employees. They employ seasonal labour and some do their work with their family.
- (e) In 1990 small planters had to pay export duty on sugar. That export duty was abolished in 1994. They also enjoy the package of stimulus and fiscal benefits that prevail today.
- (f) Work performed in the sugar industry was more or less of the same kind and though it would be desirable in the interest of uniformity of terms and conditions of service that workers in the same industry benefit from uniform conditions of service, it was not evident that all cane planters could afford to pay same wage for same work. MCAFL, however, had not submitted any financial statement of accounts in respect of its members.

(D) General Observations of the Tribunal

- (a) This case (RN 621) has been dragging on for quite a long time before the TAP and the ERT – nearly 9 years now.
- (b) Numerous sessions have been devoted to the examination and cross examination of witnesses on matters relating to financial statements and statistical information, on the principle of ‘capacity to pay’ of the Respondents. This tedious and time consuming examination seem to have been an exercise in futility since in the end, the Applicants Counsel stated that he did not intend to challenge them. That was done at the sitting of the Tribunal (ERT) held on 17 April 2009.
- (c) Again, at that sitting of the ERT of 17 April 2009, it was confirmed by the Co-Respondents that most of the work carried out in the cane fields of their members, were now being mostly performed on a ‘contractual basis’. Many small and medium sugar cane planters also employed occasional (temporary) workers, when the tasks or jobs at hand were too heavy to be performed by themselves or members of their families.
- (d) Counsel for the Co-Respondents, Mr. Biefun, closed his case after a scanty submission only to invite the Tribunal ‘*not to kill the hen that is laying the golden eggs by extending any award*’.
- (e) Counsel for the Respondent, Mr. Roger Montocchio, Q.C., did not make any summing up. He left it to the Tribunal to thrash out the issue, after having done with the examination of his main witness on figures concerning the ability to pay of members of the CGA.

- (f) The Tribunal was thankful to Counsel for the Applicants, Mr. Antoine Domingue, who drew its attention to the provisions of Section 87 (4) of the previous legislation (*The Industrial Relations Act, 1973, No 67 of 1973*), as subsequently amended, relating to the mandatory retrospective effect of Awards should the Tribunal consider extending an award.

The provisions in Section 73 and Section 74 of the new legislation, (*The Employment Relations Act 2008, No 32 of 2008*), now empowers the ERT: (1) to extend an Award to another employer (*Section 73*) and, (2) in its own discretion to lay down whatever conditions it thinks fit in the circumstances (*Section 74, subsection (3)*).

(E) Considerations and Reasoning of the Tribunal

- (a) It is recalled that under Sub-Part D – General - Section 97 of the Employment Relations Act 2008, the Tribunal shall, in the exercise of its functions in a matter before it under this Act have regard, *inter alia*, to: -
- (i) *the interests of the persons immediately concerned and the community as a whole;*
 - (ii) *the need to promote decent work and decent living;*
 - (iii) *the need to promote gender equality and to fix wages on the basis of job content;*
 - (iv) *the principles of natural justice;*
 - (v) *the need for Mauritius to maintain a favourable balance of trade and balance of payments;*
 - (vi) *the need to ensure the continued ability of the Government to finance development programmes and recurrent expenditure in the public sector;*
 - (g) *the need to increase the rate of economic growth and to protect employment and to provide greater employment opportunities;*
 - (h) *the need to preserve and promote the competitiveness of local products in overseas markets;*
 - (i) *the capacity to pay of enterprises;*
 - (j) *the need to develop schemes for payment by results and, as far as possible, to relate increased remuneration to increased labour productivity;*
 - (k) *the capacity to pay of enterprises;*
 - (l) *the need to prevent gains in the wages of workers from being adversely affected by price increases;*
 - (m) *the need to establish and maintain reasonable differentials in rewards between different categories of skills and the levels of responsibility;*
 - (n) *the need to maintain a fair relation between the incomes of different sectors in the community; and*
 - (o) *the principles and best practices of good employment relations.*

- (b) The Tribunal focused its attention and gave careful consideration more particularly to factors highlighted in paragraphs a) to d); i) and n), above.
- (c) We find it apposite to refer to the provisions of Section 20 of the Employment Rights Act 2008, which deals with ***'Equal remuneration for work of equal value'***:
- (i) *Every employer shall ensure that the remuneration of any worker shall not be less favourable than that of another worker performing the same type of work.*
 - (ii) *Where an employer has recourse to the services of a job contractor, the job contractor shall ensure that the remuneration of any worker shall not be less favourable than that of another worker performing the same type of work.*
- (d) In the light of evidence adduced by the parties on that issue, the Tribunal considers that it is faced with an issue regarding capacity to pay fair and just wages to workers performing the same type of work in a given sector of an economic activity. The principle of extension is not challenged.
- (e) On the economic principle of 'capacity to pay', the Tribunal gave careful consideration to the submissions of the Applicants, the Respondent and the Co-respondents. In the absence of concrete figures that could have clearly demonstrated *'incapacity to pay'* the Tribunal was flooded with words like: *the price of sugar has dropped sharply over the last nine years; the acreage under cane cultivation has greatly diminished; planters were abandoning their plantations; the price of inputs was increasing year in and year out; field work was attracting less and less young people; the only hope rested in mechanization, and this final pathetic plea 'please do not kill the hen that is laying the golden egg'*.
- (f) But they are words that are not always devoid of substance. In certain circumstances they say more clearly and precisely what figures are unable to demonstrate in a given situation. The Tribunal gave considerable thought to two statements in particular. The first one coming from a reply of the Secretary of the CGA in reply to a question from Counsel for the Applicants. Mr Blackburn said that it would be difficult to analyse and compare the financial situation of the seven small planters of the CGA who had implemented the Part-Award of 1999, in relation to the thirty odd members of the CGA who had not implemented the Part-Award, unless the study was carried out on a case-by-case basis, which he thought would be irrelevant to the present issue.
- (g) The second statement that greatly enlightened the Tribunal came from the General Manager of the MCAFL, Mr. D. Goburdhun. In his deposition under oath before the Tribunal, he made it clear that the MCAFL had no alternative to resisting the extension of the 1990 and 1999 Award and Part-Award. Most of its members were resorting to casual labour and job

contractors to carry out piecework. Either they paid the price agreed or they run the risk of seeing their crop remaining standing and their plantations ruined. It is a harsh reality and may be the law of the jungle, but agricultural business has always been the survival of the fittest. Fortunately, as can presently be observed, land owners – big and small alike - who can no longer make a decent living from their plantations are converting their lands to other more profitable uses.

- (h) Yet, it would appear that the challenges which the sugar industry is faced have, so to say, forced the stakeholders to look rather at the opportunities than at the threats they represented. That new mindset has demonstrated, once again, the resilience of the sugar community as a whole, and the sugar cane planters in particular, to refuse defeat. The new situation has revived their will and capacity to innovate, to be more creative and productive. They are diversifying their material, financial and human resources towards more profitable ends.
- (i) It is well known that preferential tariffs, subsidies and exemptions, safety nets of all sorts, coupled with the proverbial resistance to change of human beings, have never been conducive to seeing beyond the horizon or to thinking the unthinkable, in whatever sector of economic activity, more particularly in agriculture. Authorised sources of our sugar industry go as far as saying that ‘King Sugar is fast becoming King Cane’ (Vide *l’Express Dimanche* No 16957 of 26.07.09 p 9, an opinion expressed by no less than a top Manager of a large sugar producing unit, Mr. Thierry Marron).

(F) Decision of the Tribunal

In the light of above paragraphs and in the absence of meaningful figures that would have allowed us to forecast a comprehensive and intelligent estimate of the approximate cost of various possibilities and scenarios, the Tribunal has not ventured further into the avenue of figures and probabilities.

The Tribunal has carefully weighed the need for justice and fairness to workers of the sugar industry generally, the principle of securing uniformity for remunerating appropriately and adequately work of the same nature in the sugar industry, and the financial burden which any increase in wages imposes on those who have to foot the bill.

The Tribunal has remained alive to the burden of costs it would have imposed on the planting community of the sugar industry not affiliated to the MSPA, had the request of the Applicants for giving retrospective effect to the extension of the Part-Award of 1999, nine years after it had been published in the Gazette, been entertained.

In light of all these considerations and reasoning, and in accordance with the provisions of Sections 73 and 74 of the Employment Relations Act, No 32 of 2008, the Tribunal decides and awards as follows:

To extend the Part-Award of the PAT dated 10.12.1999, published in the Government Gazette as General Notice No 2788 of 1999, to the whole of the sugar industry, with effect from 1 July 2009, as follows:

- (i) 7% with effect from 01.07.2009 to be paid by 31.12.09;**
- (ii) the remaining 7% with effect from 01.07.2009 to be paid by 28.02.2010.**

.....
(sd) Rashid HOSSEN
President

.....
(sd) Philippe Edward Blackburn
Member

.....
(sd) Bulram Tacouri
Member

.....
(sd) Renganaden Veeramootoo
Member

Date: 23 September 2009