

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

RN 961

Before :

Rashid HOSSEN	-	President
Geeanduth GANGARAM	-	Member
M.P. Jacques Henri DE MARASSE-ENOUF	-	Member
Hurryjeet SOOREEA	-	Member

In the matter of :-

Maritime Transport & Port Employees Union (MTPEU)

and

Cargo Handling Corporation Ltd (CHCL)

IPO Mauritius Ports Authority (MPA)

This dispute has been referred by the Minister responsible for Labour, Industrial Relations & Employment by virtue of Section 82 (1) (f) of the then Industrial Relations Act 1973.

The newly enacted Employment Relations Act 2008 makes provision for such dispute to be heard before the present Tribunal :

“108. Transitional Provisions :-

Any proceedings pending immediately before the commencement of this Act before the Permanent Arbitration Tribunal and the Civil Service Arbitration Tribunal shall be deemed to be proceedings pending under this Act and may be proceeded with before the Tribunal”.

The points in dispute are :-

1. Whether the salary of the seven employees transferred on loan from The Mauritius Port Authority (MPA) to the CHCL should be adjusted as per the MPA Salary Revision 2005 or otherwise.
2. Whether all the employees of the Operations Section who have been appointed before 30th June 2003 should be governed by the conditions of service of Salary Restructuring Committee (SRC) 1997 or otherwise.
3. Whether Mr. Lilramsingh Degamber, ex-Plant & Equipment Operator (Superior Grade) should draw an increase of salary equivalent to 3 increments as from the date of his appointment as RTG Operator on 24 September 2005 or otherwise.
4. Whether the period of continuous employment of the daily paid Forklift Drivers for period June 1990 to 30 June 1997 should be computed in their years of service for pension purposes or otherwise.

Dispute No. 1 :-

"Whether the salary of the seven employees transferred on loan from The Mauritius Port Authority to the CHCL should be adjusted as per the MPA salary revision 2005 or otherwise".

Statement of case of the APPLICANT :

1. On 30 May 1997, following an agreement reached between MPA, CHCL, MTPEU and the Docks & Wharves staff Employees Union (DAWSEA) the seven employees were transferred from the MPA to the CHCL to train the staff of the CHCL.
2. The seven employees received a flat allowance over and above their basic salary paid by MPA.
3. In 2000, the salaries of these seven employees were adjusted according to recommendations made by the MPA.

4. In 2001 CHCL gave an interim increase which did not concern these seven employees.
5. In 2002, following a request from these seven employees to return back to MPA, a new agreement was signed by CHCL, MTPEU & DAWSEA to the effect that the seven employees would keep their posts, their title and the basic salary they earned at MPA. But they would not form part of any promotion exercises at the CHCL.
6. In 2003, the CHCL implemented a new salary structure which once more did not benefit to the seven employees from the MPA : Their salaries remaining as that payable there.
7. In 2005, a new salary structure is implemented at the MPA. The operations supervisor & assistant operations supervisor who were working there benefited from this increase.
8. These seven employees did not receive any salary revision since 2000, whereas their colleagues in CHCL obtained an interim increase in 2001 and a general revision in 2003, and their counterparts at MPA obtained a general increase in 2005.

Statement of case of the RESPONDENT :

1. The salaries of the seven employees transferred on loan from MPA to CHCL cannot be adjusted as per the MPA salary revision 2005 since they are already earning a higher salary than their counterparts at the CHCL.
2. The post of Operations Supervisor of MPA is parallel to the post of Senior Terminal Assistant at CHCL. However, their basic salary is higher than those of the Senior Terminal Assistant on post set at CHCL.
3. In august 2007, four out of the seven employees initially on loan from MPA to CHCL as operations supervisors have been transferred back permanently to MPA.

4. It was agreed between the management of CHCL and MTPEU & DAWSSEA that the seven employees on loan will be governed by the same conditions applicable at the CHCL as from 14.01.2002, except for general conditions prevailing at MPA such as pensions rights, leaves, etc. They would however continue to earn the basic salary they were earning at MPA.
5. Though the three employees are earning basic salary as at SRC 2000 MPA, their pay packet at CHCL compared to their counterparts at the MPA is higher. They are actually earning more than the senior terminal assistant on post at CHCL.
6. It was not agreed that the salary review 2005 at MPA would be applicable to the employees on loan at CHCL.
7. Management cannot discriminate against employee of the CHCL in offering higher salary to the employees on loan.
8. The three other employees still on loan at CHCL are free to join MPA as the other four employees did.

During the various sittings, both Mr. Moosa Ibrahim (Sam) Assistant Operation Supervisor at MPA representing the Applicant, and Mr. Raj Ganoo, respondent's representative, stood by what was mentioned in their respective statement of cases.

Mrs. G. Manna submitted :

The initial agreement was to cover the period 1997 to 2000. That is why the SRC 2000 was applied. When the new agreement was signed in 2000, it did not mention its duration, and therefore the SRC 2003 & 2005 are not applicable. The employees can still go back to work at MPA if they so wish, but they cannot get the best of both worlds : the higher benefits of CHCL and the higher salary of MPA. As the training is now completed, it would be unfair for CHCL to pay different salaries to employees doing the same job.

Mr. D. Ramano submitted :

From the outset, the CHCL was agreeable to employ these seven employees, but DAWSEA, the CHCL's Union, objected until 2002 where an agreement was signed by all parties. In the trade-off, the employees would not get any promotion at CHCL, but would keep the salary they were earning at MPA.

Since then, they never received any increase although the MPA advised the CHCL to adjust their salaries. The CHCL was a party when the contract was signed. They must now bear the consequences of their signature. It is unfair for any employee not to benefit any review of this salary since year 2000.

After careful consideration of the evidence, the Tribunal makes the following observations :

1. There existed an agreement signed by all parties in 2001 stipulating that the seven employees transferred at CHCL "will continue to earn the basic salary they earned at the MPA." They would keep their titles, but would benefit from other conditions of CHCL such as overtime, productivity bonus, etc. However, they will not be considered for any promotion at CHCL. Parties knew at the time of signature that the basic salary at MPA was higher than at CHCL and that other benefits were more important at CHCL than at MPA. It was clear then that their basic salary was MPA's and the rest was the concern of CHCL.
2. In the MPA's mind, as mentioned in their statement of case, any change in their salary scale had to apply to these seven employees. In fact, in 2005, they sent to CHCL the new salaries applicable to these employees, which CHCL deliberately ignored.
3. It matters not that they have not chosen yet to shift back to the MPL. The option is theirs. The spirit of the agreement is that while they are at the CHCL, they are to continue to earn the basic salary they earned at the MPA and it stands to reason that any increase in the salary within the MPA should have a direct impact on those seven employees at the CHCL.
4. Respondent's Counsel conceded that the second agreement signed in 2000 whereby some of the employees were willing to stay at the CHCL makes no mention of any duration of that stay. The harm has been done and management should have foreseen that such a

disparity could be created in handling lightly administrative affairs of the company. But we must not overlook the fact that these seven employees (now reduced to three) contributed towards the creation of the setting up of the CHCL and if their end of the month pay packet is higher than others doing the same time work, it should not be looked upon as discriminatory. Furthermore, we wish to add that it is not for the Tribunal to direct those three remaining employees on how to exercise their option. This option has been given to them by the Respondent.

5. The common intention of the parties was to make the salaries evolve, which patently was not done since 2000.
6. The frustration created amongst the CHCL employees because of discrimination in salaries against them is justified. It was due to the way the transfer was administratively managed.

In the light of the above, the Tribunal is of the considered view that the case of the applicant has been made out. The Tribunal awards accordingly with respect to the three remaining employees on a personal basis.

Dispute No. 2 :-

"Whether all the employees of the Operations Section who have been appointed before 30th June 2003 should be governed by the conditions of service of Salary Restructuring Committee (SRC) 1997 or otherwise"

Statement of case of the APPLICANT :

1. In 1999 and 2000 a group of employees were recruited on a temporary basis at the CHCL, who appointed them on a permanent basis as from 01 January 2003.
2. On the 1st July 2003, CHCL implemented a report from a new Salary Restructuring Committee (SRC 2002) who had recommended some changes to the existing conditions specific to the Operations

Department. The changes were made with the proviso that the new recommendations should be applied to new entrants.

3. Thus, all those who were in post should preserve the same conditions which were in force before 01 July 2003, i.e. as per the SRC Report 1997.
4. The CHCL wrongly applied these new conditions to all those who were already appointed in January 2003 and were in post before the implementation of the new SRC Report.

Statement of case of the RESPONDENT :

1. According to the SRC 2002 (implemented in 2003), all employees on a casual basis were to be appointed on the permanent establishment of the CHCL.
2. The recommendation of the SRC were approved by the Board of Directors in December 2002, but were implemented in July 2003 for financial reasons with the consent of the Unions.
3. The casual employees having been appointed on a permanent basis in January 2003 were de facto governed by the new SRC report 2002 which was in force in December 2002.
4. SRC 1997 does not thus apply to those casual employees.

Applicant's representative claims that the SRC 2002 report was never approved by the Union in December 2002 because they received the report only in January 2003. The Union never agreed that the report was to be implemented as from July 2003 for financial reasons.

Respondent's representative explained that the Board of CHCL management had approved the SRC report 2002 in December and decided to apply the changes in salary in July 2003 for financial reasons although other components were applicable as from January 2003.

In her submission, Mrs. G. Manna stated that there was no need to get the consent of the Union concerning the application of the SRC 2002. These employees were made clear on employment that this new SRC – and not the old one – would apply to them.

While Mr. D. Ramano underlined that the SRC 2002 has been imposed on the Union, which is contrary to sound industrial relations. In fact, during a meeting held on 14th January 2003, the Union was informed that it would hopefully be remitted a copy of the said report on 21st January 2003. So its application cannot take effect as from 1st January 2003.

After consideration, the Tribunal notes and comments as follows :

1. The SRC 2002 report was received by the CHCL management in December 2002.
2. The respondent made it clear that the report was to be implemented “as is”, and was thus not negotiable. This contention has not been contradicted by the applicant.
3. The management decided in its wisdom that the application of the said report would start in July 2003 for financial reasons.
4. The mere fact of receiving a copy of the report in January 2003, a month after it has been submitted, is not a valid reason to challenge the Board’s decision as far as the date of application of its recommendations.

The Tribunal finds no reason to go against the management prerogative. This dispute is set aside.

Dispute No. 3 :-

"Whether Mr. Lilramsingh Degamber, ex-Plant & Equipment Operator (Superior Grade) should draw increase of salary equivalent to 3 increments as from the date of his appointment as RTG Operator on 24 September 2005 or otherwise".

Statement of case of the APPLICANT :

1. Mr. Lilramsingh Degamber, was employed as Plant & Equipment Operator (Superior Grade) from July 1998 and was drawing the basic salary of Rs. 11,325 in august 2005.
2. In August 2006, the CHCL advertised the post of RTG Operator with the Salary Scale of Rs. 9,425 x 275 – 9,700 x 325 – 11,650 x 400 – 12,850 – 15,050. The post has the same salary scale as all the posts which are classified in the SRC Report 2002 in grade OPS 8.
3. The post of Plant & Equipment Operator (superior Grade) restyled as Plant Operator is classified in OPS 10 with the salary scale of Rs. 7,775 x 275 – 9700 x 325 – 11,650 x 400 – 12,850.
4. On 10th January 2006, the CHCL appointed Mr. L. Degamber as RTG Operator as from 24th September 2005 with the salary point of Rs. 11,325 in the scale of RTG Operator.
5. As a matter of fact, Mr. L. Degamber had been promoted from the grade of Plant Operator (OPS 10) to RTG Operator (OPS 8) without any increase in salary.
6. The Union contends that all those who are promoted from a lower grade to a higher grade should benefit a higher salary from the moment they are promoted in that job.

Statement of case of the RESPONDENT :

1. The post of RTG Operator was created in the year 2005 after the purchase of new and modern equipment for the Port.
2. The post was advertised to internal and external candidates and any employee of the CHCL irrespective of their department could apply for the post, provided they possess the basic qualifications.
3. The selection of candidates, coming from various departments and categories of employees, internally and externally, was carried out by a consultant from Le Port Autonome du Havre, France.
4. The selection procedure consisted of various tests and personal interviews, as the selected candidates had to possess certain aptitude and skills to be trained on the simulator at Le Port du Havre in France.
5. The post of RTG Operators was not a promotional route for the Plant Operators since not all candidates selected for the post came from the category of Plant Operators. They were Terminal Assistants, Drivers and included also external candidates.
6. Out of 80 candidates, 20 were appointed to the new post of RTG Operator, which is not a promotional post, with the following salary scale : Rs. 9,425 x 275 – 9,700 x 325 – 11,650 x 400 – 12,850– 15,050.
7. Mr. Degamber will continue to earn the increment as set out for RTG Operator up to the top salary of Rs. 15,050.

Counsel submitted as follows :

Mrs. G. Manna:

The post of RTG not being a promotional post, the issue of increment does not thus arise.

Mr. D. Ramano

As the post of RTG operator is higher than that of Plant & Equipment Operator, particular training overseas being necessary, it is legitimate for the employee to expect an increase in his salary.

Tribunal's conclusion

The contention here is whether the RTG Operator post is a promotional post or not. In the box, Mr. Ibrahim, the applicant's representative, agreed that the RTG Operator post was created in 2005, and was not a promotional one. It was not even mentioned as such in the scheme of service. The advertisement was opened to any potential candidate internally and externally.

Mr. Gunoo, the respondent representative, confirmed that the new post of RTG Operator was not a promotional route for Plant Operators. The new job requested mainly specific skills and necessary training. Experience was not a prerequisite.

The Tribunal finds that the applicant's contention is not born out by the evidence. This dispute is thus set aside.

Dispute No. 4 :-

"Whether the period of continuous employment of the daily paid Forklift Drivers for period June 1990 to 30 June 1997 should be computed in their years of service for pension purposes or otherwise".

Statement of case of the APPLICANT :

1. In 1991, CHCL recruited 22 operators as PPE on a casual basis until 30 June 1997. On 1st July 1997, they were appointed on a permanent basis.
2. During these years, they were offered employment without any break of 28 days.
3. In 2001, following a dispute on the salary point of these employees, Justice H. Balgobin awarded that all these employees should be compensated by way of additional increment for the years they were on a casual basis.

4. In view of the above, the Union is requesting that the period 1991 to June 1997 be computed for pension purposes as there was no break of 28 days in their employment.

Statement of case of the RESPONDENT :

1. The Operators were recruited on a casual basis, i.e. they were called to work whenever CHCL could provide work for them.
2. For the calculation of their pension, the date of their appointment on a permanent and pensionable establishment (01.07.97) only is to be taken in consideration.
3. The dispute before the PAT has already adjudicated on the present dispute. The casual employees have already benefited increments for the period they were employed as casual employees.

In her submission, Mrs. G. Manna referred to the existence of a contract binding both parties. According to her, it would be improper for the Tribunal to interfere in this contract.

Mr. D. Ramano put forward that their contract was renewed automatically every month as there has been no break of 28 days. So these employees must be considered as having been continuously employed.

After considering the evidence, the Tribunal comes to the following findings:

1. The 22 employees, although employed on a casual basis, worked everyday during these seven years, either on the day or the night shift.
2. There was no break of 28 days between one contract and the other.

3. Although the Labour Act provides that continuous employment is : “The employment of a worker under an agreement, or under more than one agreement, where the interval between one agreement and the next does not exceed 28 days.”, there is nothing in substance that would justify going outside the terms of the agreement signed on 18th May 1998.

In the light of the above, the Tribunal considers that the case of the Applicant has not been made out. The dispute is set aside.

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(sd) Rashid Hossen
President

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(sd) Geeanduth Gangaram
Member

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(sd) M.P. Jacques Henri De Marasse Enouf
Member

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(sd) Hurryjeet Sooreea
Member

Date: 10th November 2009