

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 72/09

Before:

Indiren Sivaramen	- Vice-President
Balram Tacouri	- Member
Abdool Feroze Acharauz	- Member
Hurryjeet Sooreea	- Member

In the matter of:-

V.Packiry Poullé, R.Patchay, M.Cassam & N.Ramdoo (Applicants)

And

Mauritius Housing Company Ltd (Respondent)

The point in dispute (similar for all Applicants) in the present matter is:-

“Whether the pensions payable to Messrs M.Chintaram, V. Packiry Poullé, R. Patchay, M.Cassam and N.Ramdoo following their retirement under the Mutually Agreeable Retirement Scheme should be revised after each salary revision at the Mauritius Housing Company Ltd in the same manner as the pensions of all the employees who have retired from the company.”

This matter has been referred to the Tribunal by the Commission for Mediation and Conciliation (“the Commission”) by virtue of Section 69(7) of the Employment Relations Act. The case of Mr M.Chintaram was also referred to the Tribunal but the latter has passed away before the referral by the Commission. Following a motion made by Counsel, Ms Moonshiram, who appeared for the Respondent, and in the light of the stand of Counsel, Mr Pertab who appeared for the four Applicants (and who had stated at a previous sitting that he was also appearing for the deceased employee), the Tribunal has set aside the case of late Mr Chintaram. Indeed, nobody can step into the shoes of the deceased in the present ‘labour dispute’ (which relates to claims for revision of pensions) as defined under the Employment Relations Act, and also the same Act provides that an employee has to give his consent for a matter to be referred to the Tribunal for arbitration. All the Applicants were present except Mr Packiry Poullé (represented by Mr Patchay) and the Respondent was represented by Mr B. Ramlaul.

Mr Patchay deponed in his own name and on behalf of the other applicants. He solemnly affirmed to the correctness of the averments in the statement of case of the Applicants. He stated

that Mr Packiry Poullé had undergone an eye surgery, and the latter was also absent when the matter was called for hearing two weeks back. Mr Patchay however informed the Tribunal that he was representing all the Applicants. He was referred to an Award delivered in the case of one Mr Rawat (**Mr F. M. Rawat and Mauritius Housing Company Ltd, Permanent Arbitration Tribunal, RN 973/07**) and he stated that the Award would not apply to the Applicants and that they were not parties in the other case. He stated that as far as he knows, all the Applicants, including himself, joined the Respondent before 1 May 1991. He then referred to the Employee Handbook of the Respondent dated September 2006 and produced a copy of same (Doc A). He described the pension and compensation he received when he retired under the Mutually Agreeable Retirement Scheme (hereinafter referred to as the “MARS”) which was introduced at the Mauritius Housing Company Ltd by the Appana report 2004 which reviewed the pay and grading structures and conditions of service of employees of the Respondent (a Voluntary Retirement Scheme was already discussed by management during the year 2003 and a discussion paper was circulated as per the unchallenged averments of the Applicants at paragraph 11 of their Statement of Case). He was paid a compensation equivalent to 1½ times his monthly salary for every year of service that he could have further worked with the Respondent and he received the normal pension he would have received ‘if he had reached his full pension period’. He stated that for normal retirement, the pension paid is reviewed and aligned with any increase in salary at the Respondent, and that this practice has been adopted from the 1998 Pay Research Bureau (PRB) report. He added that there was nothing in the “agreement” or relevant letter he received, about future benefits and that it was not stated therein that an increase in salary would have no bearing on his pension. When they realized that their pensions had not been revised as opposed to those of other pensioners of the Respondent which had been revised, they sent a letter to their employer. There was no answer, and finally he was informed that the Board of the Respondent had decided that they were not entitled to a revision of their pensions. He went on to say that though the Award in the case of **Rawat (above)** is not binding on them, that Award still supports their requests that their pensions should be revised. He stated that their situation should not be different from the other pensioners of the employer and that there is nothing to support the fact that they should be discriminated.

In cross-examination, he acknowledged having received a letter dated 19 July 2005 emanating from the Respondent and a copy of this document was produced and marked Doc B. He agreed that Doc B referred to all the benefits that were payable to him under MARS but he added that this would be all the benefits he was entitled to, at that time. He was aware of a letter sent by Mr Packiry Poullé and a copy of a letter from the Respondent in reply to that letter was produced (Doc C). He explained that this was at a time when the stand of the Respondent was still unclear in relation to revision of pensions in general. Copies of letters sent to Mr Packiry Poullé and Mr Cassam under the MARS were also produced and marked Docs D and E respectively.

Mr Ramlaul then deponed on behalf of the Respondent and he maintained under solemn affirmation the contents of the objections filed. He explained that the Applicants retired under the MARS have been granted an enhanced benefit scheme. He added that employees retiring under MARS are granted an additional pension at the rate of one sixtieth of their pensionable emoluments for each completed period of three years’ service (subject obviously to the conditions provided in the Appana report) and are entitled to an additional lump sum ranging from 1 to 1½ month’s salary for each completed year of service (when in fact it is for each year

of service that they could have worked) subject to a maximum of fifteen months' salary. He then referred to Doc A and stated that the document under 'Retiring Benefits Scheme' does not make any mention of the MARS and that even paragraph 6.11.2(a)(v) of Doc A, where mention is made of "(when he retires) on any other ground approved by the Board", would not cater for the MARS but for other special circumstances such as retirement in cases of indiscipline or misconduct.

In cross-examination, Mr Ramlaul conceded that in a letter sent to Mr Cassam, there was nothing spelt out in relation to "pension rights to come". He also added that it has not always been the case for the pensions of employees of the Respondent who have retired, to be reviewed with salary revisions. He then stated that as from the year 2003 approximately, the Respondent was revising the pension of pensioners whenever there was an increase in salary for employees. He accepted that following an award of the Tribunal on 4 March 2008 in the case of **Mr F. M. Rawat v Mauritius Housing Company Ltd**, the pension of Mr Rawat, a former employee of the company, was revised. He confirmed that all the Applicants joined the company before January 1991. He did not agree that the decision concerning whether the pension should be increased or not in relation to those who retired under the MARS was taken only much later by way of a board decision. He maintained that those who left under the MARS could not be granted an increase in their pension. A copy of an extract of minutes of a board meeting was also produced (Doc F). When questioned about the motivation given to employees to opt for the MARS, he replied that the employees who opted for the MARS already received an 'enhanced' pension. He added that the early retirement scheme has to be distinguished from a redundancy plan. He agreed that the pensions of other employees (who have not retired under the MARS) of the Respondent are revised following revisions of salaries for employees of the Respondent. He accepted that the Appana report is silent on the issue of revision of pensions for those retiring under the MARS and that the letter sent to Mr Cassam (Doc E) is also silent on this issue. The issue arose in the year 2008 because it was then that a question in relation to revision of the pension payable was asked and clarification sought from management.

Ms Moonshiram submitted that it is not contested that the Applicants signed the MARS agreement and that by virtue of Article 1134 of the Civil Code, "les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites." She stressed on the fact that the Applicants have been granted enhanced benefits and more compensation, and cannot now come and say that they need an increase in the pension being paid to them. She referred to the award delivered by the Tribunal (as it was then, the Permanent Arbitration Tribunal) in the case of **Rawat (above)** where both parties (in that case) had moved for an award in terms of the amended averments contained in the Respondent's Statement of Case which is to the effect that on 30 January 2008, the Board of Directors of the Respondent decided that following the salary review, the pensions of those officers (like Mr Rawat) who had joined the company before 1 May 1991 should be reviewed. It was expressly provided that this decision excludes those officers who retired under the MARS. She produced a copy of the award in that case (Doc G) and a copy of another award delivered in the case of **Doorgapersad Mohit v Industrial and Vocational Training Board, RN 840** (Doc H). The latter case was, according to her, authority for the proposition that once an employee has signed an option form, he is estopped from bringing any dispute.

Mr Pertab then submitted and he stressed on the fact that there was in fact no agreement signed in the present matter and that there was only a letter which makes no mention of the fate of revision of salaries on the pensions being paid to the Applicants. Even the Appana report is silent on this issue. Mr Pertab suggested that it was only the board decision in January 2008 which dealt with the matter and that at the very least there was ambiguity on this issue so that the employee who is a subordinate of the employer is to be given the benefit of the doubt. He added that the option form was not clear and that it was never made clear to the Applicants that their pensions would not be revised following salary revisions for employees of the Respondent. Ms Moonshiram in reply referred to paragraphs 15, 16 and 17 of the Statement of Case of the Applicants and stated that it was clear that the latter admitted having signed the agreement.

The Tribunal has examined all the evidence on record including the submissions of both Counsel. First of all, the evidence on record including paragraphs 15, 16 and 17 of the Statement of Case of the Applicants shows clearly that the Applicants (all of whom had retired under the MARS) had opted to benefit from the scheme and this was then approved by management so that there were necessarily agreements entered into by the Applicants with Respondent. Documents such as Docs B, D and E reproduce the retirement benefits payable to the Applicants under the MARS.

The Tribunal will now consider Sections 14.1 and 14.2 of the Appana report (annexed as Annex 9 to the Statement of Case of the Applicants) which read as follows:

“14. Mutually Agreeable Retirement Scheme

14.1 It has been submitted that the organisation does have excess capacity at certain levels and that a Voluntary Retirement Scheme might help. We recommend the introduction of a Mutually Agreeable Retirement Scheme to allow an officer, aged 45 or more, who is willing to retire voluntarily and whom management would wish to part with, to do so with enhanced retirement benefits whereby an officer may be granted an additional pension at the rate of one sixtieth of his pensionable emoluments for each complete period of three years’ pensionable service provided that:-

- (a) the addition does not exceed ten sixtieths; and*
- (b) the addition together with the remainder of the officer’s pension does not exceed the pension for which he would have been eligible if he had continued to hold the office held by him at the date of his normal retirement.*

14.2 We additionally recommend for officers retiring under the mutually agreeable retirement scheme payment of an additional lump sum ranging between 1 to 1½ month’s salary for each year of service that the officer could have further worked with the Company had he opt to retire on ground of age limit subject to a maximum of 15 months’ salary.”

Inherent in the MARS, there is an incentive for employees to opt for the scheme since (1) they may be entitled under Section 14.1 of the Appana report to an increased pension compared to the pension they would otherwise have been entitled to (theoretically) on the basis of the years of service they reckon. The Tribunal uses the word “may” since it may happen that the employee accepting MARS will not benefit from any additional pension at all if the additional pension calculated as per Section 14.1(a) (above) will make the total pension thus payable to the

employee exceed the pension that he would have been eligible if he had continued to hold the office held by him at the date of his normal retirement. There is still however an incentive to the employee to accept MARS in view of the possible additional lump sum to which he may still be eligible under Section 14.2 of the report.

It is apposite to note that Section 14.1(b) is to some extent similar to regulation 7(2)(b) of the Statutory Bodies Pension Funds Regulations 2000, as amended, which reads as follows:

7. *Pension on retirement on ground of overmanning, abolition of office or at request of statutory body*
 - (1) *Where an officer retires from a statutory body on the ground of overmanning, abolition of office or at the request of the statutory body with the officer's consent, he may -*
 - (a) *in lieu of any gratuity payable under regulation 4(2), be paid a pension in accordance with regulation 4(1) as if the words "not less than 10 years" were omitted from regulation 4(1);*
 - (b) *in addition to the pension payable under regulation 4(1), be paid, subject to paragraph (2), an additional pension at the annual rate of one-sixtieth of his pensionable emoluments for each completed period of 3 years' pensionable service.*
 - (2) *The additional pension payable under paragraph (1)(b) shall not-*
 - (a) *exceed ten-sixtieths of the pensionable emoluments specified in that paragraph;*
 - (b) *together with the officer's pension payable under regulation 4(1), exceed the pension for which the officer would have been eligible if he had continued to hold the office held by him at the date of his retirement and had retired at the age of 60, the pension being computed by reference to the annual pensionable emoluments drawn by him at the actual date of his retirement.*

However, it would appear that the last part of regulation 7(2)(b) above has been deliberately omitted in the Appana report for the Respondent. Thus, there are two alternative ways of interpreting Section 14.1(b) of the Appana report. It could mean that the maximum pension payable would be the pension the employee would have been eligible if he had continued to hold the same office at the date of his normal retirement but with the same annual pensionable emoluments drawn by him at the actual date of his retirement or it could be interpreted as meaning that the maximum pension payable would be the pension he would have been eligible if he had continued to hold the office held by him at the date of his normal retirement taking into account the then annual pensionable emoluments he would have received following successive salary increases. By omitting the last part of the paragraph as highlighted in regulation 7(2)(b) of

the Statutory Bodies Pension Funds Regulations 2000 above, the Appana report seems to allow for the fact that the pension may be reviewed with salary increases.

Now, it is not disputed that retirement under the MARS, even though a special scheme giving enhanced benefits, is, above all, one form of retirement which is available at the Respondent. The Tribunal cannot agree with Mr Ramlaul when he states that the 'MHC Employee Handbook' (Doc A) which is dated September 2006, that is, well after the retirement of several employees of the Respondent under the MARS does not refer at all to the MARS. A wide and general formula has been used at paragraph 6.11.2(v) of Doc A which reads as follows: "(when he [meaning an employee] retires - ... (v) on any other ground approved by the Board;" and the Tribunal has no hesitation in finding that the MHC Employee Handbook necessarily does refer to retirement under the MARS also and that as rightly pointed out on behalf of the Applicants, the Respondent has not in any manner whatsoever (not even clearly and unambiguously) shown in any document produced before the Tribunal that the pension paid under MARS is to be treated differently from the pension paid in "normal" cases as the representative of the Respondent would term it. The reality is that in both cases, the payments made are pensions and that in the present case there is absolutely no reason to differentiate one from the other.

It is not disputed that following the transfer of undertaking from Mauritius Housing Corporation to the Respondent, there were provisions in the law (The Mauritius Housing Corporation (Transfer of Undertaking) Act 1989) for every member of the staff of the Corporation to benefit from terms and conditions of work which are not less favourable than those obtained by him before the transfer of undertaking. As per an agreement reached between the union of employees and the Respondent in July 1991 (Annex 6 to the Statement of Case of the Applicants), the representatives of the Respondent had even agreed to review the terms and conditions of service of employees in the light of any new recommendation of the PRB. This is perhaps what prompted Mr Patchay to aver that even though the Respondent has its own reports for review of pay and grading structures and conditions of service, the PRB recommendations might still apply in certain circumstances. The PRB has ever since the Report of the Salaries Commissioner, Mr D.Chesworth in 1988 adopted the policy that the pensions of retired officers have to be recomputed on the basis of the revised pensionable emoluments of the relevant grade as from the date of implementation of the new salaries. This policy applies not only to pensioners in the civil service but also to pensioners of parastatal and other statutory bodies and local authorities. Though the Respondent is now a 'private company', it is still considered to be a statutory body for the purposes of the Statutory Bodies Pension Funds Act 1978 as amended. Even Doc A emanating from the Respondent refers specifically to this Act. Indeed, clause 6.11.1 (under section 11) of Doc A provides as follows:

"The provision of the Statutory Bodies Pension Fund Act 1978 shall apply regarding the retiring benefits of the substantive employees on the establishment of the MHC Ltd. However, employees who joined MHC before 1978 should continue to be governed by the MHC Pensions Fund Rules."

It is admitted by Mr Ramlaul that this policy to review pensions following a revision of salaries is also adopted by the Respondent (and rightly so) but he added that this only recently as from approximately the year 2003. The Tribunal finds that this policy cannot have been adopted since

the year 2003 since there was a dispute concerning this same issue of revision of pension after a salary revision at the MHC Ltd (though not in relation to someone retiring under the MARS) in the case of **Rawat (above)** and an award had to be delivered in the year 2008. In any event, this policy of revising the pension is now the rule, and had the Respondent really intended not to allow for revisions of pensions for those who had retired under the MARS, this should have been clearly laid down in writing and communicated to the employees who were contemplating the MARS so that any agreement entered into under the MARS would have provided clearly that pensions granted would not be subject to revisions following salary revisions. Even Doc C which is dated 27 December 2004 cannot be of much help since this was much before the dispute in the case of **Rawat (above)** where the issue of revision of pension in general after a salary revision at the MHC Ltd was then considered, and where the award delivered was in favour of the applicant Mr Rawat.

The Tribunal thus finds that the pensions of the Applicants who joined the service before 1 May 1991 and who retired under the MARS should be revised after each salary revision at the Respondent in the same manner as the pensions of other employees who have retired from the company at normal retirement age.

Indiren Sivaramen (sd)
Vice-President

Balram Tacouri (sd)
Member

Abdool Feroze Acharauz (sd)
Member

Hurryjeet Sooreea (sd)
Member

23 March 2010