<u>EMPLOYMENT RELATIONS TRIBUNAL</u>
AWARD

RN 57/09
In the matter of:-

Mr Siva Ramasawmy (Disputant)

And

Central Electricity Board (Respondent)

The point in dispute in the present matter is:-

"Whether the Central Electricity Board should grant Mr. Siva Ramasawmy 6% increase on monthly pension as from 1 July 2005 excluding government increase of year 2005."

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 Tribunal proceeded to hear both parties and the Disputant was assisted by Mr A.Domingue, Senior Counsel whilst the Respondent was assisted by Mr R.Unnuth, Counsel.

The Disputant deposed before the Tribunal and he stated that the present case is a test case as it may affect the interests of some eight hundred and eighty-eight other pensioners. He is claiming for an increase in his pension (of 6%) as from 1 July 2005 without the deduction of the cost of living allowance ("COLA"). He referred to an agreement signed on 9 February 2006 between the trade union of workers (CEB Staff Association) and the Respondent (annexed to the Disputant's Case as Appendix A) whereby it was provided that the request that the monthly pension of employees having retired prior to July 2005 be revised shall be referred to the CEB Board for a decision. Initially, on 30 November 2006 the Board had refused on the ground of the difficult financial situation of the Respondent. The matter was discussed anew and the Board this time approved an increase in the monthly pension of retired CEB employees as from 1 July 2005 in the range of 6% to 9% inclusive of July 2005 compensation. The Disputant referred to a copy of a letter dated 7 July 2008 emanating from Management informing the union of this decision (copy annexed as Appendix H to the Disputant's Case). Mr Ramasawmy added that the last increase which was in the range of 7% to 10% was granted in the year 2001 and that this was "in addition to COLA".

Mr Ramasawmy is not agreeable with the policy of including COLA in the increase granted. He averred that "COLA" is a statutory decision and the increase they sought cannot include COLA the more so that the increase is only 6%. He stated that the COLA for the minimum scale for the period 2005/2006 was 6.2% rounded to the next rupee or Rs170 whichever was the higher. He stated that for three months he received an increase of 6% with no deductions and then a sum of Rs 310 representing COLA was being deducted from the increase granted to him. He stated that some workers had only an increase of 1% or no increase with the deduction of COLA which was applied.

In cross-examination, Mr Ramasawmy agreed that the Board of the Respondent always had a discretion as regards the revision of the monthly pension of the employees who retired prior to July 2005. When it was put to him that the Board took the decision in 2008 to pay the 6% to 9% inclusive of compensation because the Board knew that it did not have the financial ability and capacity to pay, the answer of Mr Ramasawmy is quite telling. He stated: "*If I can answer your question, you said earlier the Board is supreme and has got the final decision and is supreme. I quite agree with you. The Board, in its discretion, instead of saying 6%, it could have said 'Mr Ramasawmy, I give you only 1%!' I should have said 'Thank you, Mister."? Why say 6%, then inclusive of COLA? The Board has the right, the discretion and it is supreme, I quite agree with you, 'Tell me, Mr Ramasawmy, I give you only 2%.' I say 'Thank you very much!'? Why say 6%? This is something not only ambiguity but catastrophic!*"

The pension of retired employees is paid from the CEB Staff Pension Fund but he did not agree that the Fund was incurring losses. He could not say if the Fund was running through a deficit of Rs 254.2 millions as at year 2003. He agreed that the increase in pension is however paid from funds of the Respondent. He also accepted that year in year out, the Respondent has to inject funds in the CEB Staff Pension Fund. He was not aware if there are now two Pension Funds running in parallel and that workers who have joined the Respondent as from January 2004 are compelled to join the new pension scheme (CEB Defined Contribution Scheme). It was put to Mr Ramasawmy that the situation at the Respondent was precarious and that the CEB could not service the compensation as Disputant would have wished it to be, and the latter replied that serving employees had obtained salary increases of up to 35% - 40% with effect from year 2005 whilst there was recently a salary increase in the range of 40% to 50%. He compared these with the additional Rs 310 being sought. An extract of the recommendations of Mr Appana who was appointed Salary Commissioner in the year 2009 was produced (Doc A). Mr Ramasawmy did not agree that he was paid without deduction of COLA for three months through oversight.

In re-examination, he stated that since he was initially paid for three months the capacity to pay was there. He again referred to the salary increase granted to serving employees as from 1 July 2005.

Mr Sahye, Principal Human Resource Officer, then deposed on behalf of the Respondent. He stated that the Respondent operates 24 hours a day and provides an essential service in the utility sector. The Respondent cannot frustrate its employees and has to give priority to salaries so as to retain its professionals. He added that the CEB Staff Association had made a request to grant a pension increase but the latter was informed in writing that the Board was not able to entertain their request favourably. Mr Sahye averred that when the impugned decision was taken afterwards to grant an increase inclusive of July 2005 compensation, the Respondent was (still) facing a very difficult financial situation. The decision was taken in fairness to pensioners so as not to penalize them. He then referred to an Actuarial valuation prepared by Hewitt Bacon & Woodrow (for CEB Manual Workers Pension Fund). The Respondent then contacted SICOM to create a pension scheme which would not be as beneficial as the existing pension plan. The CEB Defined Contribution Scheme was then set up and all new recruits joining Respondent as from 1 January 2004 were requested to join the new scheme.

Mr Sahye stated that the decision of the Board of the Respondent in relation to the pension increase was taken in the interest of the Respondent. He referred to a new report made by Mr Appana who is working on the errors and omission exercise, and he ventured to say that there may be an increase as from 1 July 2009 which would be much better than the 6% in the present case.

In cross-examination, Mr Sahye conceded that the Disputant has nothing to do with the CEB Manual Workers Pension Fund. He agreed that in the year 2001, pensioners were granted an increase of 7% to 10% on their pension without any deduction. He explained that for that year there was no salary revision. He then conceded that there was an increase granted as from November 2001 and that this was as a result of a memorandum of understanding reached between the CEB Staff Association and Respondent. The basis was the Bundhoo Salary Commission, and the Respondent was to take into account what had been granted to serving employees and then see what percentage was to be given to pensioners.

At another sitting, Mr Sahye produced copies of actuarial valuations for the CEB Staff Pension Fund as at 31 December 2000 (Doc B), as at 31 December 2009 (Doc C) and as at 31 December 2002 (Doc D). Mr Sahye agreed that the pension increase approved by the Board of the Respondent in the year 2001 was paid out the funds of the Respondent. It was possible that the salary increase to employees amounted to some Rs 41 millions but despite that the Respondent was able to pay the increase in pension. In 2005, there were further increases in salary. On the other hand, in the year 2008 there was no salary increase. Mr Sahye could not confirm when it was put to him that as per the annual report as at 31 December 2001 the Respondent incurred a loss of Rs 193,763,137-. He agreed that it was possible that in the year 2008 there was a loss of Rs 380,818,357-. He also agreed that the financial situation of the Respondent had improved in the year 2008 when compared to the year 2006 where there was a net loss of Rs 1.1 billion. Mr Sahye agreed that from 1990 to 1999, the pension increase was indexed to the increase in salary. He added that as the financial situation of the Respondent was deteriorating the Respondent introduced a clause in the 2001 and 2006 collective agreements that all increases will be referred to the Board of Respondent.

Mr Sahye was referred to Annex A to the Statement of Case of the Respondent which is a copy of a Memorandum of Understanding ("MOU") between CEB Staff Association and the Respondent dated 26 December 2000. This MOU however is not directly relevant to the present dispute because of the collective agreement dated 9 February

2006 entered into between the same parties and which was deemed to have taken effect as from 1 July 2005.

Mr Sahye stated that Mr Appana has recommended that as from 1 July 2009, all pension increases shall be borne out by the two Funds and not by the Respondent. Active employees will thus have to contribute more so as to make good the deficit just like the Respondent who will be called upon to inject money in the two funds to cater for the deficit. He stated that the COLA paid in the year 2005 has been entirely borne by the Respondent and not the pension fund. To have a scheme where the pension fund will be self-sufficient, that is, to provide for pension and increases in pension is a plan for the future.

In re-examination, Mr Sahye was referred to the "Investment Strategy" recommended on Doc B. He added that, according to him, the Board has maintained its contribution in the Fund at 11.5% of pensionable remuneration and not 12.6% as recommended. This could be because of the financial situation of the Respondent. Mr Sahye preferred not to comment on the "Investment Strategy" recommended in Doc D. He stated that there was a deficit of Rs 759.9 millions as per Document C (as at 31 December 2009) and that the consultant has recommended that the investment strategy should be improved. The Respondent is injecting funds in the said pension fund and improving the administration of the fund. A majority of the serving staff have agreed to contribute more so as to benefit from a higher pension. This is a long term plan however and Mr Appana did take this on board when making his 2009 recommendations. To a question through the Tribunal, Mr Sahye confirmed that following the implementation of Mr Appana's recommendations, the intention is that all adjustments to pension including COLA would be paid by the pension fund.

Mr Domingue then submitted that this is not a dispute of right because it is agreed that the quantum which had to be decided upon was a matter which was entirely in the hands of the Board as per the agreement entered into between the trade union and Respondent. The point at issue is a dispute of interest, that is, whether pensioners are to be treated more or less the same way as they were treated in the year 2001 or are they to be treated differently in 2008 (backdated to year 2005) on account of the financial inability to pay. The Disputant is happy with the quantum which has been awarded but does not agree with the deduction of COLA. He referred to a net loss of Rs 193.7 millions for the Respondent in the year 2001 when the latter had to reckon with about Rs 41 millions as increase in pay packet. In 2005, he referred to a loss of about Rs 322 millions with increase in pay packet amounting to Rs 6.5 millions. In 2008, Mr Domingue suggested that there was a loss of Rs 380 millions (from a loss of Rs 1.1 billion in 2006) with no salary increase to be met. He submitted that the situation in 2001 would be more or less similar to that in 2008 and that what had been done in 2001 should have been done for the 2005 exercise.

Mr Unnuth relied on section 11.3 of the Collective Agreement between the union and Respondent (Appendix A to Disputant's Statement of Case). He submitted that the Board was given a very wide discretion and that this cannot fettered after that it decided to grant the increase inclusive of July 2005 compensation. He stressed on the deficits noted in successive actuarial valuations of the CEB Staff Pension Fund and submitted that the Respondent had a duty to inject cash in the Fund for the future benefit of serving workers. At the same time, the Respondent had to bear the cost of pension increase. He then stressed on the financial consequences if the increase was to be granted exclusive of COLA. This would represent a figure exceeding Rs 16 millions. He then stated that for the future there is light at the end of the tunnel and the Fund will service the whole pension including increases. The newly set up pension fund also adds water to the mill of the Respondent.

The Tribunal has examined all the evidence on record and the submissions of both Counsel. The crux of the matter is the collective agreement dated 9 February 2006 between the CEB Staff Association and the Respondent which is deemed to have taken effect as from 1 July 2005 and which applies to the present case. Clause 11.3 provides as follows: "*The request of the Union that the monthly pension of employees having retired prior to July 2005 be revised shall be referred to the CEB Board for a decision*." Indeed, initially on 30 November 2006 the Board had simply refused an increase in pension on the ground of the difficult financial situation of the Respondent. This was so despite the fact that an increase in pension had been granted in the year 2001. Mr Sahye explained that the deteriorating financial situation of the Respondent led the Board to insert clause 11.3 in the 2006 collective agreement. Finally, in the year 2008, the Board agreed to an increase in pension as per the terms of the letter dated 7 July 2008 (Appendix H to the Disputant's Case).

The present dispute which has been referred to us by the Commission under Section 69(7) of the Employment Relations Act relates to a dispute reported by an individual worker. The Tribunal observes that the legislator has precluded that a similar dispute reported by a trade union be referred by the Commission to the Tribunal and that such a dispute may only be referred jointly by both parties to the Tribunal for voluntary arbitration. In this case, the Tribunal is only concerned with the individual worker Mr Ramasawmy and irrespective of whether reference has been made to it being a 'test case', the Tribunal can only arbitrate the dispute in relation to the Disputant. Now, the Disputant has stated that he would have been happy if he was granted 1% or 2% increase but excluding the cost of living allowance. The stand of the Applicant thus appears to be that the dispute is not on the quantum of the increase but on the principle of whether an increase can be granted according to the formula adopted, that is, "inclusive of the July 2005 compensation." The unavoidable conclusion is that the two are intricately linked. If the Tribunal is to award as per the terms of reference, which are very specific and very importantly do not include any 'exit door' such as "or otherwise", that is, that the Disputant should be granted 6% increase on monthly pension as from 1 July 2005 excluding government increase of year 2005, the quantum of the effective increase will nearly double in the case of the Disputant. The latter stated before the Tribunal that he obtained an effective increase of 3.2% (when we exclude COLA) whilst in fact he obtained 3.64% as per the Disputant's Case.

This dispute is thus directly related to the capacity to pay of the Respondent. The Tribunal observes that the legislator has expressly provided under Section 97 of the Employment Relations Act, that the Tribunal may, in the exercise of its functions in relation to a matter before it under this Act have regard, inter alia, to the capacity to pay of enterprises. Evidence has been adduced that the increase in pension is paid out of funds of the Respondent and not from the CEB Staff Pension Fund even though the way forward as recommended by Mr Appana (as per Doc A) would be for any adjustment of pension to be made out of the respective Pension Funds and not from the funds of Respondent. It has been put to Mr Sahye that the Respondent had incurred losses of Rs 193,763,137, some Rs 1.1 billion and Rs 380,818,357 for the years 2001, 2006 and 2008 respectively. Though the financial situation of the Respondent improved considerably in 2008 when compared with 2006, the Tribunal cannot but find that the financial situation in 2008 was by far worse than in the year 2001 even if we have to cater for the increase in salary paid in the year 2001. The Tribunal cannot accept the submission of learned Counsel for the Disputant that the financial situation in 2008 was fairly similar to that in 2001. Now, the pension increase granted in 2001 was within the range of 7% to 10% exclusive of COLA. The pension increase in the year 2008 was in the range of 6% to 9% inclusive of COLA. Disputant has obtained an effective increase of 3.64% in 2008 compared to around 7% in the year 2001. The Tribunal, in the light of all the evidence on record including the financial situation of the Respondent and the very weak financial position of the first Pension Fund, cannot find that the decision of the Board of the Respondent on the issue of increase in pension is unreasonable.

The Tribunal hastens to add that the formula adopted may not be the best solution which was available. There is however not a unique formula for proposing a pension increase and even the union as per paragraph 14 of Disputant's case had apparently made two alternative proposals for the revision of pensions. The Tribunal may also refer to the proposed methodology for the re-computation of the pension of pensioners on the Respondent's payroll as at 30 June 2009 as per Doc A. Mr Appana recommends the re-computation of a hypothetical pension based on a hypothetical pensionable emolument which will have to be determined. Pension will then be reviewed on the basis of the recomputed hypothetical pension (and not the existing pension) adjusted by such percentage that the financial situation dictates. This avenue may be explored, and an appropriate solution acceptable to one and all may be found for future revision of the pension of retired employees at the Respondent. The Tribunal wishes to stress on the fact that all the conditions which apply in relation to an increase in salary (competitiveness, job contents changes, inflation and so on) do not necessarily apply in the case of pension increase. Inflation will affect both existing workers and pensioners but competitiveness and job contents changes will not. The Tribunal will not allow itself to be swayed by the percentage of increase granted to current workers.

The fact that the increase in pension in the year 2001 was exclusive of government increase is not very helpful to the case of the Disputant. Indeed, the 2006 collective agreement provided expressly that the request for revision of pension would be referred to the Board for a decision. Also, there is no averment that the Board had in fact granted Disputant a 6% increase in pension exclusive of COLA in the year 2008. The excess payment made to the latter for three months has since then been recouped. This overpayment for three months is certainly not enough to conclude, in the light of all the evidence on record, that the Respondent had the capacity to pay.

There is no compelling reason in the present matter to intervene in relation to the decision taken by the Board. For all the reasons given above, and since the Tribunal cannot find that the Disputant should be granted the same 6% increase excluding government increase of year 2005, the matter is set aside.

(sd) Indiren Sivaramen
Vice-President

(sd) K. Venkatasawmy
Member

(sd) M.P.J.H. De Marassé-Enouf
Member

(sd) M.C.A. Laurette
Member

10 December 2010