

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 11/10, 12/10

RN 11/10 Mr Deoraz Gooriah (Disputant No 1)

And

Mauritius Revenue Authority (Respondent)

RN 12/10 Mrs Maneshwaree Mavintah Ramdeny (Disputant No 2)

And

Mauritius Revenue Authority (Respondent)

The two above cases have been referred to the Tribunal for arbitration by the Commission for Conciliation and Mediation under Section 69(7) of the Employment Relations Act. The two cases have been consolidated with the agreement of all parties since basically the same issue is being raised in both cases. Counsel Mr Patten and Mrs Saha appeared for Disputant No 1 and they appeared together with Counsel Mr Ruchpaul for Disputant No 2 whilst the Respondent was assisted by Mr Jean Louis from the State Law Office. The point in dispute as per the terms of reference in case RN 11/10 is as follows:

“Whether the monthly allowance granted to Mr Deoraz Gooriah should not form part of his basic salary and reckoned as part of the said basic salary for pension purposes.”

There was a second point in dispute as per the original terms of reference in case RN 11/10 but this second dispute has been dropped on behalf of Disputant No 1. The point in dispute as per the terms of reference in case RN 12/10 is as follows:

“Whether the Mauritius Revenue Authority should integrate the allowance of Rs 10 755 offered to Mrs M M Ramdeny in her basic salary.”

Mr Gooriah deposed before the Tribunal and he stated that he is personally aware of the contents of his Statement of Case and solemnly affirmed that the contents thereof are true. He produced a copy of a letter of an offer of employment at the Respondent together with a conversion table for salary which was annexed with the same letter (Doc

A1). He explained that the conversion table comprises six columns with headings basic salary, travelling allowances, passage benefits, monetary value of leaves reduction, a consolidated salary which will include a 10% increase and finally a last column which gives the salary at entry point. He averred that the whole of the consolidated salary was pensionable. He produced a copy of an extract from the Human Resources Management Manual of the Respondent (Doc B1) and referred specifically to paragraphs 1403 and 1404 of the said document which relate to personal salaries outside of pay scales. He stated that his transfer to the Respondent was confirmed and he produced a copy of letter addressed to him by the Financial Secretary (Doc C1).

Mr Gooriah stated that his performance at the Respondent has at all times been rated as good, and that he performed in accordance with the expectations of his superiors. He produced a copy of a letter (Doc D1) emanating from the Respondent dated 23 September 2008 in relation to a performance appraisal carried out and where his overall performance had been evaluated as 'excellent'. He stated that his problems with the Respondent started when the latter carried out a salary review which took place between September 2008 and the end of 2008. He produced a copy of a circular memo emanating from the Respondent dated 6 January 2009 (Doc E1). The memo provides the salary scales for the seven grades existing at the Respondent. There was no special chapter in relation to holders of personal salary who necessarily had to belong to one of the seven grades mentioned earlier, except for a sentence inserted as a footnote to the effect that all holders of personal salaries as at 30 June 2008 will convert within the salary scale of their respective grade. He also referred to clause 7 in the said memo with the heading "All allowances to lapse".

Mr Gooriah averred that the relevant date for the implementation of the salary review exercise was 1 July 2008 and that as at that date, he was drawing a basic salary of Rs 52,308. He stated that he could not however situate his salary on the Master Conversion Table annexed as Annex 1 to Doc E1. He then referred to Annex VI to the same document which relates to the salary scale for grade 4 employees and he stated that he could not situate his salary on the scale which ended with a present scale of Rs 30,055 converted to a new scale of Rs 40,000. His salary was nowhere to be found on Annex VII to Doc E1 which relates to grade 5 employees. He could find his salary on Annex VIII which relates to grade 6 employees and he stated that he would have been at the last but one row at Rs 52,000 which is converted to Rs 72,500. Since the salary scale provided for each grade is not the Master Conversion obtainable in the civil service, he stated that he cannot say where his salary should have been converted exactly. Converting his basic salary to only Rs 51,250 would be tantamount, according to him, to relegating him to what he was receiving about nine to ten years back. He could not fit on Annex VIII (above) because he was not a grade 6 employee at the

Respondent. He produced a copy of a letter whereby he made representations following the issue of the memo (Doc F1) and a copy of a letter he received in reply (Doc G1). Revised proposals were being made to him and he was offered a gross monthly personal salary of Rs 50,024 and a non pensionable allowance of Rs 12,328. He stated that this was unacceptable as he suffered a decrease in his basic salary of Rs 1,058 and would not be entitled to any pension or lump sum on the increase by way of the non pensionable allowance. He produced a copy of a table showing how he would be prejudiced (Doc H1) and a copy of his representations made to the Ministry of Labour and Industrial Relations (Doc I1). He also produced a copy of his own notes (Doc J1) and he stated that though there was initially willingness on the part of the Respondent to negotiate, he was in January this year informed that the Board of the Respondent was resisting his claims.

Mr Gooriah referred to the averment made at paragraph 5 of the Statement of Case of the Respondent and he stated that if they were allowed to draw a personal salary in line with Section 28(3)(b) of the Mauritius Revenue Authority Act, their accrued pension rights should have been preserved. He stated that for other employees it might be true that they have received on average an increase of 28% but in his case there was no increase at all and only a decrease. He produced a copy of an illustration of the proportion of increase given to holders of personal salary (Doc K1). He maintained that it was the July salary and not the June salary which has to be used to find out if there was any increase in his basic salary. This would thus include two increments which he had obtained and which started as from 1 July 2008. He did not agree that the new terms and conditions of service offered to him are not less favourable than his previous terms and conditions since, according to him, he was not granted any increase which could be accounted for pension purposes. He does not think that the Respondent has acted fairly. He stated that he has to retire by December 2011 but that he can retire at any time now since he has reached the appropriate retiring age. He produced a table he prepared to show that, according to him, he will be worse off now if he retires than if he had retired in December 2008 before the circular memo was issued (Doc L1). He prayed that he be restored in his rights and that the monthly allowance proposed to be granted to him forms part of his basic salary as from the date of the salary revision. He also prayed that the monthly allowance be reckoned as part of his basic salary for pension purposes as from the date of the salary revision.

In cross-examination, he agreed that when the Respondent was formed he applied for the post of Team Leader and he was subsequently offered the post of Technical Officer which is at grade 4 in the Respondent's salary scale. He agreed that as Technical Officer he excelled and has been given two increments prior to the salary review of 2008. He had nothing to reproach to the Respondent prior to the salary review

exercise. He stated that the quantum of Rs 12,328 is not in dispute. He stated that he is right now receiving a personal salary and that he should continue receiving a personal salary until he retires. He stated that heading XIV in the Human Resource Management Manual relates to "Transition policies". In re-examination, Mr Gooriah stated that his dispute to integrate the said sum of Rs 12,328 in his basic salary is not based solely on the Human Resource Management Manual but on the general principle that when there is a salary review, all employees are given increases. He added that the review exercise at the Respondent was based on the same model as the Pay Research Bureau review with several similar features such as option forms, principle of 92% discounted rates, etc. He had a legitimate expectation of an increase in his pensionable basic salary.

Mrs Ramdeny then deposed before the Tribunal and she stated that the facts in her Statement of Case are to her personal knowledge and she solemnly affirmed to the truth of the contents of her Statement of Case. Her Statement of Case raises the same issue as in the case of Mr Gooriah. She prayed that the monthly salary proposed to be granted to her forms part of her basic salary for pension purposes as from the date of the salary revision. She did not agree with the points raised by the Respondent on the same basis as Mr Gooriah deposed. In cross-examination, Mrs Ramdeny agreed that she had applied for the post of Team Leader and was offered the post of Technical Officer. She has no qualm in relation to the quantum of Rs 10,755 which was being offered to her and only wanted same to be integrated in her basic salary.

Mr Doomun, a freelance Management Consultant then deposed before the Tribunal and he stated that he has worked for many years at the Pay Research Bureau and has retired from the service as Deputy Director. He joined the Pay Research Bureau in 1978 with a Master's degree and he has followed a number of courses including a course in Public Administration for a certificate in Consultancy Management. He stated that salary review is a very complex issue and that one needs to have the know-how and experience to assess duties, responsibilities and organizational structures to come up with recommendations which will satisfy one and all. He stated that he has been involved with the merger of the audio visual section of the Ministry of Education with that of the Mauritius College of the Air, redeployment of staff with the closure of the Tea Development Authority and the Central Housing Authority and that he is aware of other mergers and transfers of staff from the civil service to parastatal bodies. He stated that it may happen that when an employee of an organization has to join a new organization, he was already drawing a higher salary than the salary being proposed in the new organization. In that case, in order not to frustrate such an employee, the latter may be granted a personal salary up to the time he or she will retire. At the next salary review, Mr Doomun stated that the employee will derive a new personal salary which will still be

a higher salary than that he would normally have derived. Once the person holding a personal salary retires, the post he was holding will become evanescent and will have to be abolished. No other person can claim to benefit from the same package offered as personal salary to the person who retired. According to him, this has never given rise to any practical difficulties.

He added that previously when contribution for pension was made exclusively by the employer, the personal salary was considered for the purposes of pension and lump sum. He would not personally grant a non pensionable allowance in lieu and instead of the personal salary. Mr Doomun explained that normally an allowance is paid to a person holding a higher post and that the allowance is non-pensionable. When the person is promoted to this higher post, the allowance in turn lapses. The purpose of a salary review is to allow a person to recoup the loss of purchasing power and if there are any technological changes within the organization, these have to be taken into account in the review exercise. He stated that normally a non pensionable allowance instead of a salary compensation following a salary review exercise cannot be fair. He stated that he has performed many consultancy works and that he advises his clients to give copies of his reports to all parties concerned so that the latter are aware of the recommendations and can decide whether to opt for the said recommendations.

In cross-examination, he stated that the concept of personal salary has been mentioned in many salary review reports drawn by several salary commissioners. He agreed that the granting of a personal salary is decided by the consultants carrying out the review and that it is discretionary. He stated that in the case of employees who were redeployed from the Tea Development Authority to the civil service, there were employees who were already drawing higher salaries so that the latter were given personal salaries. The latter retired from the service with the personal salaries and with all the benefits. He also referred to the case of the Central Housing Authority. He has not looked at the conditions of service of the Disputants and would not be able to say how they compare with those of the employees who were transferred from the Tea Development Authority and Central Housing Authority.

Mr Benydin then deposed before the Tribunal and he stated that he has been involved in the adjustment of salaries for the Customs and Excise Department, in the last two Pay Research Bureau reports in 2003 and 2008 and the last salary review at the Respondent. He also participated in negotiations for the terms of transfer of the employees from the public service to the Respondent. He produced a copy of a memorandum of understanding signed between the Government of Mauritius, the Respondent and the Unions dated 13 June 2005 (Doc M1). He stated that there were negotiations between the parties based on the principle enunciated in the memorandum of understanding that the terms and conditions of employment will not in any way be

less favourable than what are obtainable in the public service. There were negotiations on the frequency of (salary review) reports, that is, every three years and the reports would be based on three main factors: external competitiveness, internal equity and budgetary framework. He added that the guidelines on which the Respondent was to conduct its next salary review was discussed with the unions on 9 March 2006 and he produced a document to that effect (Doc N1). He stated that in the future in strategic terms the Respondent wanted to ensure that its remuneration structure would be more attractive than that offered in the civil service. He stated that his reaction to the circular memo, copy marked Doc E1, is that all allowances except certain specific allowances like acting allowance, shift allowance, etc. would be integrated in the salary. He stated that the personal salaries should normally convert within the respective salary scale and not fall outside the said scale.

Mr Benydin produced an extract of paragraphs 701 and 708 of the Human Resources Management Manual of the Respondent (Doc O1). He averred that the objectives of the remuneration policy of the Respondent which reflect the values and mission of the Respondent have not been applied in the case of the Disputants. He produced a copy of a letter received from the Respondent (Doc P1). He stated that when the Director-General of the Respondent informed them of the contents of the salary scale at the end of December 2008, it was agreed that there would be a review committee to take cases of anomaly. He added that it was agreed that there were anomalies and that special attention had to be given to a handful of cases where certain officers would stand at a disadvantage on conversion to the new salary structure. He then produced an extract of the Pay Research Bureau report 2008 (Doc Q1). He stated that the Contributory Defined Benefit Pension Scheme introduced in the civil service has been adopted by the Respondent and that since the Respondent is an approved service for pension purposes, all those who were transferred from the civil service to the Respondent will have the same pension benefits as obtained in the civil service. The witness produced a copy of an option form used in the civil service (Doc R1). Mr Benydin stated that he does not know of any example where following a salary revision, a personal salary has been split between a pensionable and a non pensionable element. He produced a copy of representations he has made to the Respondent in relation to the issue of personal salaries (Doc S1).

Mr Benydin stated that Mr Appanna was acting as consultant or adviser for the Respondent. There was no report following the exercise but simply a salary scale which was circulated. He maintained that for all salary reviews there has always been a report. He referred to certain examples of posts in the civil service where it is expressly provided that personal salaries are being paid. He stated that the Respondent should have adopted the same principle where a personal salary is paid and which will

ultimately become evanescent when the officer retires. Mr Benydin produced other extracts of a report of the Pay Research Bureau (Docs T1 and U1). He added that the Respondent had accepted to give them a special salary when they joined the institution and that following a review, any adjustment has to be made for the full salary. He maintained that it was unfair on the part of the Respondent to have recourse to the non pensionable allowance in the case of the Disputants. Mr Benydin stated that the transition period in this case has lasted two years and that this is a long period and should have come to an end when the salary review was carried out and everything should have been adjusted and cleared.

Mr Maunikum, Team Leader at the Human Resources Division of the Respondent then deposed and he stated that the Respondent was set up on 1 July 2006. He produced a copy of the salary structure at the Respondent when it was set up (Doc V1). He stated that the Disputants were Chief Inspector of Taxes in the former Income Tax Department and they applied for the post of Team Leader but were offered the post of Technical Officer. He stated that the Disputants, being former employees of the Income Tax Department, were governed by Section 28(3)(b) of the Mauritius Revenue Authority Act (an extract produced and marked Doc W1). He added that there was thus an obligation on the Respondent to ensure that the latter were employed on no less favourable terms than in their previous employment. He referred to paragraphs 1403 and 1404 under the chapter 'Transitional policies' in the HR Management Manual which would ensure that this obligation of the Respondent is translated in the terms and conditions of employment. Mr Maunikum then explained that all the previous benefits of the employees were considered in determining the entry point salary of every officer at the Respondent. All benefits such as passage benefits, travelling allowance, loss of leaves, loss for tax element were added and then 10% were added to that figure as compensation and the figure obtained was used as entry point of the officer at the Respondent. The personal salary holders were also granted increments every year based on performance.

The entry point for Mr Gooriah was Rs 48,482 and for Mrs Ramdeny it was Rs 47,254 and these entry points were beyond the salary scale for Technical Officer, and were personal salaries. The Disputants should normally have been in the salary scale starting from Rs 30,055 to Rs 39,260. There were sixteen other employees at the Respondent who were recipients of personal salaries. He stated that a technical committee was set up to carry out the salary review and it comprised of the Director of Finance and Director of Human Resource assisted by Mr Appanna, the then Director of the Pay Research Bureau. He produced a copy of the terms of reference of the technical committee (Doc X1). He stressed on the fact that Mr Appanna was not the salary commissioner. Mr Maunikum adduced evidence in relation to his qualifications;

he holds a first degree in Economics, a Masters degree in Economics and a 'Masters' in Human Resources Development and Planning. He is in the field of Human Resources since 1997 and has worked in several Ministries before coming at the Respondent. He however conceded that though he has been involved with salary review exercises, his involvement was not as extensive as was the case with the exercise carried out at the Respondent. He was involved as Team Leader in the HR Department in discussions in relation to the setting up of the technical committee. He stated that the cost factor was a major element in deciding to opt for the technical committee as opposed to contracting out the whole exercise to an independent consultant.

The technical committee had to submit its report to the Board through the Director-General. He referred to the terms of reference of the Committee and to its powers and responsibilities as per Doc X1. The Board of the Respondent made the final decision concerning the new salary structure and this was communicated in the circular of 6 January 2009. He produced a copy of the circular, salary structure proposed and the option form emanating from the Respondent (Doc Y1). An employee is not automatically bound by the new salary structure but to benefit from the new terms he has to sign and submit the option form to the HR Department. Mr Maunikum stated that the salary as at 30 June 2008 including extra remuneration is converted as per the Master Conversion Table to obtain the new salary. He added that the stand of the Respondent in relation to personal salaries is clear at page 1 of the circular letter and all holders of personal salaries had to convert to salaries as per their respective grades. This was to do away with personal salaries. Mr Maunikum averred that the Respondent by so doing wanted to correct an anomaly whereby an officer in one grade was drawing a salary in a higher grade. This was not an infringement of paragraphs 1403 and 1404 of the Human Resources Management Manual which he described as transitional policies which were meant to apply at the time of recruitment at the Respondent and which would not go on indefinitely. Thus, employees like the Disputants had to convert to the top salary in their respective grades. In the case of both Disputants the top salary would have been Rs 51,250 but after the circular dated 6 January 2009 was issued there were representations made by holders of personal salaries that they were not agreeable to the decision.

Mr Maunikum stated that correspondences were exchanged between parties and the matter was referred by the aggrieved employees to the Ministry of Labour. The Respondent sought further advice from Mr Appanna and the offer of a non-pensionable allowance was made to the holders of personal salaries. The allowance proposed for Mr Gooriah was Rs 12,328 and for Mrs Ramdeny it is Rs 10,755. They had to sign the option forms to benefit from the offer of a basic salary of Rs 51,250 plus the non-pensionable allowance. Out of eighteen persons, only the Disputants did not sign the

option forms. The Disputants are still receiving their personal salaries and a copy of the pay slip of Mr Gooriah and that of Mrs Gooriah were produced (Docs Z1 and AA1). Mr Maunikum stated that if the Disputants had opted for the new salary structure they would not have received any increments and that with their personal salaries they have obtained increments in July 2009 and April 2010. The Respondent has no objection that the Disputants draw the personal salaries they are currently drawing.

In cross-examination, Mr Maunikum stated that the salary at entry point is “recognized” for pension purposes and that both Disputants were transferred to the Respondent as personal salary holders. He agreed that “rights” mentioned in paragraph 1403 of the HR Management Manual will include pension rights. He did not agree that the principle enunciated in paragraph 708 in Doc O1 had not been followed in the case of the Disputants. He agreed that Mr Gooriah is an excellent officer as per performance report received. He agreed that the salary of Mr Gooriah was Rs 52,308 as at 1 July 2008. He stated that it is not reasonable for the Respondent to offer a lower salary following a salary review exercise. Mr Maunikum stated that there was a salary review to take effect as from 1 July 2008 because this was one of the agreements reached with the union that following the Pay Research Bureau report, the Respondent will also look at the salaries of its staff since the latter were previously in the civil service. It was put to him that the salary review exercise at the Respondent was carried out along the same lines as the Pay Research Bureau report and he replied in the negative and stated that he could not say so. He did not agree that the Respondent carried out the review exercise after the Pay Research Bureau 2008 report so as to bring all salaries in line with the salaries in the civil service. He agreed however after being confronted with Doc P1 that the Respondent is following the same principles for pension purposes as in the public service and parastatal bodies.

Mr Maunikum agreed upon further cross-examination that the salary review exercise came up after the Pay Research Bureau exercise so that the Respondent could ensure that its remuneration structure would be more attractive than in the civil service. He was referred to Doc P1 and admitted that in respect of Disputants the increase in basic salaries did not keep in view the pension contribution and reduction in gratuity but he added that this is why provision was then made to compensate the officers by way of a non-pensionable allowance. He agreed that it would be a legitimate aspiration that a salary rise be pensionable. He was referred to paragraph 1.36 of Doc Q1 and he agreed that the term “acquired rights” therein would include pension rights acquired by the Disputants. Mr Maunikum was then confronted with paragraph 19.7 of Doc Q1 and with the workings of Mr Gooriah as per Doc L1 and he agreed that the new pension provisions proposed to both Disputants are neither more favourable nor seen to be more favourable than conditions prevailing before. However, he added that this is why

the Respondent decided to compensate them by giving the allowance. He agreed that initially as per the circular of 6 January 2008, the Respondent had failed to properly take into account the case of “personal” salary holders in its salary compensation exercise. He confirmed that the technical committee consisted of the Director of Human Resources and Director of Finance and Administration assisted by Mr Appanna.

Mr Jean Louis referred to the first dispute (the second dispute was dropped) as per the terms of reference in the case of Mr Gooriah. He referred to the Concise Oxford English Dictionary meaning of the word “grant” and suggested that first it must be established that the Respondent agreed to give an allowance to Mr Gooriah or in the alternative that the Respondent actually gave such an allowance to Mr Gooriah. He referred to the payslip of Mr Gooriah (copy produced and marked Doc Z1) and submitted that there is no allowance mentioned on the said document so that the allowance was never granted to Mr Gooriah. He suggested that since the Disputants had to and failed to signify their acceptance of the offer made by signing an option form within the deadline imparted, they were precluded from claiming that the said allowances were granted to them. He also submitted that there was never a question that the said allowance proposed would form part of the basic salary of Disputant No1. Mr Jean Louis added that what is termed as a dispute before the Tribunal is in fact a non-issue and he even raised the question as to what exactly is this basic salary mentioned in the terms of reference. Is it the said Rs 54,192 that Disputant No 1 was deriving as at June 2010 as basic salary as per Doc Z1 or is it the top point in the new salary scale of the post of Disputant No 1 which was offered to Disputant No 1 in Doc G1? Mr Jean Louis referred to the case of **S.Baccus & Ors v The Permanent Arbitration Tribunal 1986 SCJ 388**, where the Supreme Court observed that an Award of the Permanent Arbitration Tribunal which goes outside the terms of reference will be ultra petita and may be quashed just as any other Award. Mr Jean Louis added that the Respondent had not waived submission of the option form in relation to the offer made. He referred here specifically to Doc J1 produced by Disputant No 1 where the latter would have recorded the Human Resources Director recommending that the option form should be submitted even though the Human Resources Director also contemplated the possibility of employees making demands or proposals with the forms they are submitting.

In the case of Mrs Ramdeny, he offered the same arguments in relation to the basic salary and the validity of the offer in the light of the non submission of the signed option form within the prescribed time limit. Mr Jean Louis submitted that there is no unfairness or lack of transparency. He submitted that in virtue of Section 28(3) of the Mauritius Revenue Authority Act the Respondent had to ensure that persons from the former Revenue Departments and transferred to the Respondent were not employed on

terms that were less favourable than their previous conditions of employment. In relation to personal salaries, he stressed on the fact that they are discretionary and not acquired rights and that the Disputants have in any event been allowed to hold their personal salaries.

Mrs Saha in her submissions referred to the facts of the case and laid stress on Docs M1 and more particularly at paragraph 2.2.4, Doc N1, Doc B1 at paragraphs 1401, 1403 and 1404 and Doc O1 at paragraphs 701,702 and 708. Mrs Saha submitted that there was a lack of transparency since the salary review was not accompanied by a report which would have been the basis for the rationale behind the proposals. She argued that it was the non pensionable allowance which Respondent resorted to, in an attempt to remedy the problem caused to holders of personal salary, that goes against all principles enunciated in the undertakings given to the unions, in Doc N1, Doc M1, Doc W1, Doc Q1, B1 and O1. She relied on the evidence adduced by Mr Doomun and Mr Benydin and averred that there is evidence that the public sector abound in cases where personal salaries are provided following mergers and so on, and that if the salary review exercise had been carried out professionally right from the start, solutions would have been found. She added that evidence has also been adduced that an allowance which is given for a specific job or special assignment is never given in lieu of a salary increase. She referred to the concept of evanescent grade referred to by the witnesses for Disputants and submitted that personal salary holders should continue as personal salary holders up to retirement as suggested by the two witnesses.

Mrs Saha laid emphasis on the fact that it was most unreasonable after a salary review to offer the Disputants a basic salary which was less than what they were earning as at 1 July 2008. She went further and submitted that the Respondent acted in an arbitrary and discretionary manner. She referred to Doc L1 which shows, according to her, that the Disputants would be entitled to a lower salary and lower pension if they opted for the revised salary and 6% pension contribution than if they did not opt for the new conditions. She also referred to Section 94 of the Constitution and to Article 6 of our Civil Code.

Mr Patten then submitted that the offer of the top point in the new salary scale (at Rs 51,250) is the offer of the basic salary made to each Disputant. He stressed on the importance of the evidence adduced by Mr Benydin and Mr Doomun and averred that Mr Maunikum was not deponing as an expert. He submitted that on the facts this case is a far cry from the case of **S.Baccus & Ors (above)**. He added that discretion bestowed by law has to be used reasonably. He referred to the notion of reasonableness in the **Wednesbury** sense. He submitted that discretion should be exercised not only fairly and reasonably but also rationally in the sense which Lord Diplock understood it in the case of **Council of Civil Service Unions v Minister for the**

Civil Service [1985] 1 A.C. 374. Mr Patten then submitted that it is clear that the allowances should form part of the basic salaries which are the salaries which they were to be granted for that revision. He then stated that the basic salary for the purposes of the terms of reference in this case would not be the basic salaries derived by the Disputants but the basic salaries which the Disputants have been offered. To a question from the Tribunal, he stated that this interpretation should be clear from the terms of reference.

Mr Ruchpaul then submitted before the Tribunal to “help to clear the mist”. He concurred with the submissions of Mrs Saha and Mr Patten. He submitted that the basic salary in this case has become ambulatory. He added that if someone holding a personal salary has been granted an increase in salary, this should be repeated after any other review held in the future. The personal salary will disappear after the demise or the retirement of the person concerned. He submitted that the Tribunal is not bound by the term allowance used by the Respondent and that the Tribunal can always award that the ‘increase’ should integrate the respective salaries. He stressed on the fact that the two witnesses for the Disputants were called to show this ‘usage’ or ‘coutume d’atelier’ whereby all increases given by salary reviews in relation to personal salaries are integrated for pension purposes. He submitted that it was not fair for the Respondent to grant an amount of Rs 10,755 as allowance. He also criticized the fact that Mr Appanna or a member of the technical committee was not called to depone.

In reply, Mr Jean Louis referred to Doc G1 and most particularly the last paragraph which reads as follows: “*Once your Option Form, duly filled in and signed, is received, necessary adjustments, as appropriate, will be made accordingly.*” He argued that the Disputants cannot today claim that their basic salary referred to in the terms of reference is the top point in the relevant revised salary scale. He also criticized the manner in which the case for the Disputants was conducted since according to him this would be more like judicially reviewing the decision making process whereby a technical committee instead of a Salary Commissioner was appointed. He referred to Sections 72(1)(e) and 70(1) of the Employment Relations Act and submitted that the real issue is whether a term should be implied in the contract of employment of the disputants.

The Tribunal has examined all the evidence on record including documents produced and the submissions of all counsel. The Tribunal has reproduced the evidence in much detail in view of the number of documents produced, substantial evidence led by the Disputants and the line of cross-examination adopted by counsel for the Disputants. Even then, the Tribunal is of the view that the facts of the case are not really in dispute, and the whole case is to be determined on the basis of documentary evidence produced and the interpretation to be given to agreements existing between the parties. The crux of the matter is the validity of a non pensionable allowance proposed in lieu and stead

of a corresponding increase in the 'basic salary' which would have been considered for pension purposes and for calculation of the lump sum. However, before tackling such an issue, the Tribunal has to consider the point raised by Mr Jean Louis in relation to the manner in which the terms of reference have been couched in the present matter.

For ease of reference, the Tribunal will reproduce below the terms of reference in either case below:

"Whether the monthly allowance granted to Mr Deoraz Gooriah should not form part of his basic salary and reckoned as part of the said basic salary for pension purposes."

"Whether the Mauritius Revenue Authority should integrate the allowance of Rs 10 755 offered to Mrs M M Ramdeny in her basic salary."

"Grant" is defined in the Concise Oxford English Dictionary (tenth edition) as "agree to give or allow (something requested)" or "give (a right, property, etc.) formally or legally to." It is clear that the formal offers made in writing to the Disputants in Doc G1 and the correspondence sent to Mrs Ramdeny after her representation was considered do constitute the "granting" of the said offers by the Respondent to the Disputants. Whether this grant of a proposed salary structure is in turn accepted by the recipient of the offer is a different matter. If the new salary conditions granted are not accepted by the Disputants as required (within the required time limit, etc), the offers are likely to lapse but the fact is that the Respondent has made offers and did grant new conditions to the Disputants which could have been accepted and thus become binding on both parties. The terms of reference for instance do not refer to an allowance obtained (underlining is ours) by Mr Gooriah or Mrs Ramdeny. The Tribunal thus finds nothing wrong with the use of the word "granted" or "offered" in the terms of reference.

The use of the term "basic salary" is more problematic. Indeed, what is the basic salary of Mr Gooriah and Mrs Ramdeny? There is nowhere mentioned in the terms of reference that the 'basic salary' is to be taken as the salary offered or proposed to the Disputants. Both terms of reference have been phrased so as to cater for the basic salaries of the Disputants meaning inevitably the basic salaries being paid to the Disputants. Both Disputants have not accepted the offers made to them and they are currently drawing personal salaries (outside their normal salary scale) as "basic salary" as per the payslip of Mr Gooriah (Doc Z1) and that of Mrs Ramdeny (Doc AA1) (Rs 54,192 and Rs 51,822 respectively). Thus, the terms of reference as drafted raise the question as to whether the proposed non pensionable allowance for each Disputant is to be integrated in the said sums of Rs 54,192 and Rs 51,822. This has never been the case of the Disputants before us. The Disputants have all along proceeded on the basis that the 'basic salary' is to be read as the proposed (and which was not accepted)

new salary – the top point in their new salary scale – which is clear from the submissions of Mr Patten. Moreover, there is no claim that the total quantum offered as pay package is wrong or insufficient so that the simple answer to both terms of reference as drafted, is “no”. There are no dates mentioned in the terms of reference and one might even argue that the basic salaries are to be taken as the basic salaries being earned by the Disputants at the time the relevant offers were made to them. This interpretation will yield yet different figures as ‘pay packages’, and the least the Tribunal can say is that the terms of reference have been badly drafted. The Tribunal cannot amend the terms of reference referred to it (the more so after the case has been fully heard and the submissions made by Mr Jean Louis) and, in the light of the plain language used in the terms of reference, the Tribunal finds that it cannot read the terms of reference to mean that the basic salary would not be the actual basic salary received by the Disputants. To interpret the terms of reference differently would amount to rewriting the terms of reference and the Tribunal would be acting ultra petita (vide obiter dictum of the Supreme Court in the case of **S.Baccus & Ors (above)**).

Thus, without having to go further into the merits of the case, the Tribunal finds that the disputes as per the terms of reference are to be set aside. The Tribunal however is confident, bearing in mind the pertinent issue that the Disputants have raised in the present matter (though not in line with the terms of reference), and the spirit in which the Employment Relations Act has been drafted where emphasis is on meaningful negotiations, conciliation, mediation and voluntary settlement of disputes, parties should have no difficulties in accepting to come directly this time before the Tribunal (in case the matter has still not been resolved amicably between the parties) for voluntary arbitration with properly drafted terms of reference.

(sd) Indiren Sivaramen
Vice-President

(sd) Jean Paul Sarah
Member

(sd) Marie Pierre Jacques Henri de Marassé-Enouf
Member

(sd) Renganaden Veeramootoo
Member

Date: 30 July 2010