**EMPLOYMENT RELATIONS TRIBUNAL**

**AWARD**

**RN 288/11**

**In the matter of:-**

**Union of Bus Industry Workers (Disputant)**

**And**

**Triolet Bus Service Ltd (Respondent)**

The two parties have jointly referred the dispute for voluntary arbitration to the Tribunal under Section 63 of the Employment Relations Act. The parties were initially before the Commission for Conciliation and Mediation (hereinafter referred to as "the Commission") but no agreement has been reached between the parties and they both referred the matter to the Tribunal as advised by the Commission. Before the Commission, the point in dispute was stated to be:-

*"whether Management of Triolet Bus Service Ltd should grant every worker who is employed on Monthly basis as from 5th May 2008 "Annual and Sick Leave' after completed two years of service on Monthly basis without 230 days attendance at work as qualification for entitlement for the said leave as per the PAT Award RN 315 of 1994."*

The terms of reference of the dispute before the Tribunal have not been clearly spelt out in a single document but both parties referred in their Statements of Case to terms of reference which are very nearly identical to the terms of reference which were before the Commission (and in any event to the same effect). The Tribunal will proceed to deliver an Award in the matter the more so that parties have come by way of voluntary arbitration and the terms of reference, as can be gathered from documents filed in support of the voluntary arbitration, must be the same terms as were before the Commission.

Mr Lalloo, Negotiator, was called to depose on behalf of Disputant and he averred that following the Public Transport (Buses) Workers (Remuneration Order) Regulations 2008, Management of Respondent has requested workers employed on a monthly basis as from 5 May 2008 to work for at least 230 days (in any continuous period of 12 months) before being entitled to sick leave and local leave. This qualification for entitlement to sick leave and local leave was applicable in 1988 with Government Notice (GN) No. 63 of 1988. The Disputant had declared a dispute before the then Permanent Arbitration Tribunal and claimed that the qualification for local and sick leave should be removed. In 1994, the Permanent Arbitration Tribunal found that the claim of Disputant

on this item was fully justified and awarded that "employers should grant local and sick leave to all workers who have completed two years service. With effect from the 1st March, 1995." (RN 315). Mr Lalloo averred that in the year 2001, the Tribunal delivered another Award in the case RN 569 where the Tribunal would have confirmed what was awarded in case RN 315. Later, the National Remuneration Board (NRB) invited all parties to make proposals with a view to reviewing the Public Transport (Buses) Workers Remuneration Order Regulation.

The recommendations of the NRB were embodied in GN No. 76 of 2008 and the system of qualification for local leave and sick leave was reintroduced. The trade union protested against same to the then Minister of Labour, Industrial Relations and Employment and allegedly received a reply from the Permanent Secretary of the Ministry. A copy of a letter emanating from the Ministry was produced and marked Doc A. Mr Lalloo averred that at the Respondent there are now two categories of workers, i.e those who joined the Respondent before the year 2008 and those who have joined Respondent after the year 2008. The Disputant is praying that the Award delivered by this Tribunal in case RN 315 be made applicable anew to all workers. Mr Lalloo averred that there is no other company in Mauritius where there is currently some sort of qualification before a worker is entitled to sick leave or casual leave. He added that the Award (RN 315) of the Tribunal has not been challenged by way of judicial review.

Mr Nundlall, the representative of Respondent then deposed before the Tribunal and he stated that in GN No. 63 of 1988, it was provided that a worker must work 230 days in a year to qualify for sick and local leave. He stated that in 1988 and even up to now, public transport is considered as an essential service and that the NRB found that there was a big problem of absenteeism in this sector. According to him, the requirement to attend work on 230 days in a continuous period of 12 months is not an excessive requirement. He confirmed that the Award of the then Permanent Arbitration Tribunal (RN 315) delivered in 1994 removed the qualification of 230 days of attendance at work. However, he added that in the year 2001, the Tribunal did not deal with the issue of qualification for local and sick leave in its award (RN 569). Then came the Remuneration Order GN No. 76 of 2008 which reintroduced the qualification of 230 days of attendance at work during any continuous period of twelve months prior to eligibility to local and sick leave. Mr Nundlall stressed on the fact that at the same time the attendance bonus was raised from 5% to 10%. He added that whilst the Award of the then Permanent Arbitration Tribunal applied only to four bus companies which operate 50% of the total number of buses in the local bus industry, the Remuneration Order applied for the whole industry.

Mr Nundlall stated that for workers employed prior to 2008, they continue to benefit from local and sick leave without the qualification of 230 days of attendance at work. For new comers who joined the company as from 2008, the company started applying the law as it was provided for in GN No. 76 of 2008. He produced a copy of the proposed recommendations made by the NRB in 2007 on Public Transport (Buses) Workers (Doc B) and copies of an extract of the Public Transport (Buses) Workers (Remuneration Order) Regulations 2008 (Doc C) and of GN No. 63 of 1988 (Doc D).

Counsel for Disputant submitted that though an Award may have a life time (under the repealed Industrial Relations Act), in practice the conditions which have been prescribed in the Award become part of the contractual terms between the employer and the worker. He added that this is not a case of variation of an Award but a case where two categories of employees are being created, that is, one comprising of those employed prior to 2008 and the second consisting of workers employed as from 2008. This is not fair according to him. He also suggested that the present Tribunal is being requested to sit on appeal against its own Award which was delivered in 1994. He also submitted that the Tribunal should consider the Remuneration Order and not the recommendations of the NRB. Counsel also referred to Sections 72(1)(e) and 72(5) of the Employment Relations Act and submitted that an Award is more important than an Order of the NRB.

Senior Counsel for Respondent submitted that situations do not remain static and that when GN No. 76 of 2008 was made, the Ministry had already considered what existed in the past including the 1994 Award of the Tribunal. He argued that what the 2008 Remuneration Order says is valid until it is modified again or until another Award is delivered. Senior Counsel found nothing wrong with having two categories of workers and he added that one can have a category of employees getting a particular set of conditions and another one coming afterwards getting another set.

The Tribunal has examined all the evidence on record and the submissions of both Counsel. The dispute before the Tribunal cannot be considered as being tantamount to an appeal or review of an earlier Award of the then Permanent Arbitration Tribunal. This is neither an application for variation or interpretation of an Award. The facts are clear and there is no problem concerning workers who have benefitted from the 1994 Award delivered by the Permanent Arbitration Tribunal in case RN 315. The relevant dispute/claim in case RN 315 read as follows:

*"Whether the employers should grant local and sick leave to all workers who have completed two years service, or otherwise;"*

The exact terms of the relevant part of the Award are as follows:

*115. The Tribunal finds that this claim is fully justified and awards that employers should grant local and sick leave to all workers who have completed two years service. With effect from the 1st March, 1995.*

Under The Employment Relations Act, there would have been no major issue since the Award is clear and refers to all workers having completed two years' service. The award would be binding on all the parties to whom the Award applies by virtue of Section 72(1)(c) of the Employment Relations Act unless it was varied in circumstances provided in the same Act.

In the present case, the Award was delivered by the then Permanent Arbitration Tribunal under the repealed Industrial Relations Act. Section 85(1) of that Act read as follows:

"***85. Effect of awards***

*(1) An award shall be published in the Gazette, and shall-*

*(a) …*

*(b) …; and*

*(c) be binding on all the parties to whom the award applies for such period not exceeding 2 years as the Tribunal may determine."*

Section 85(2) of the same Act read as follows:

"*Any party to whom an award applies may, <u>while the award is in force</u> [underlining is ours], make an application to the Tribunal for a variation of the award and the Tribunal may, after hearing all the parties to whom the award applies, vary the award where it is satisfied that there has been, since the making of the award, a change in circumstances which justifies the variation."*

The 1994 award in the case RN 315 is strictly no longer binding on the parties. The Tribunal did not deal with the issue of qualification for local and sick leave in 2001 in the case RN 569. Though the 1994 Award is no longer binding, the effect of the Award continued with the 'incorporation' of the Award as an implied term of every contract of employment between the employees and employers to whom the Award applied. Indeed, Section 85(3) of the repealed Industrial Relations Act provided as follows:

"*Subject to subsection (4), an award shall, from the date on which the award takes effect, be an implied term of every contract of employment between the employees and employers to whom the award applies until –*

*(a) it is varied by agreement or by a subsequent award pursuant to subsection (2); or*

*(b) it ceases to have effect.*

Even as the Award ceased to have effect, it had already become an implied term of the contract of employment of the relevant employees. The Respondent continued to provide the same conditions to new comers even after a period of two years. At that time, there was nothing which suggested that new comers should or could be treated differently and the Road Passenger Transport Industry (Buses)(Remuneration Order) Regulations 1988 (or any relevant 1991 Remuneration Order) had already been made 'caduc' in relation to the qualification (for Traffic Section) for local and sick leave. Then came the Public Transport (Buses) Workers (Remuneration Order) Regulations 2008

made by the Minister effective as from 5 May 2008. Regulations 3(1) and 10 thereof read as follows:

***3.(1)*** "*Subject to regulation 10, every worker shall be –*

*(a) remunerated at the rates specified in the Schedules; and*

*(b) governed by the conditions of employment specified in the Schedules."*

***10.*** *"Nothing in these regulations shall –*

*(a) prevent any employer from remunerating a worker at a rate higher than those specified in the Schedules or from providing him with conditions of employment more favourable than those specified in the Schedules; or*

*(b) authorise any employer to reduce a worker's remuneration or to alter his conditions of employment so as to make them less favourable."*

It is apposite to note that since the workers are governed by specific Remuneration Orders, they may be subject to specific terms and conditions of employment which are different from those provided for in the Employment Rights Act (**vide The Vacoas Transport Co. Ltd. v H.Chuckory 1981 SCJ 16** in relation to the repealed Labour Act). They are governed by a special regime and the relevant Minister has wide powers under Section 93 of The Employment Relations Act to make regulations (**vide Flacq Long Mountain Bus Service Co.Ltd v The Queen and Anor. 1976 MR 218** where the Supreme Court referred to the powers of the Minister under corresponding provisions of the law in the repealed Industrial Relations Act). The Respondent could not by virtue of Regulation 10 (above) alter the conditions of employment of workers who have already benefitted from the 1994 Award. Indeed, with the 1994 award, once a worker had completed two years' service, he was eligible without any further qualification to his annual local and sick leave.

However, the Respondent was allowed (although not bound) to provide for terms and conditions as provided in the Public Transport (Buses) Workers (Remuneration Order) Regulations 2008 when entering into new contracts with new comers as from 5 May 2008. There is nothing which would impinge on fairness or amount to discrimination in as much as the new terms and conditions offered to new comers have been prescribed (even though as minimum conditions of employment) by enactment (GN No. 76 0f 2008) and that new comers must have necessarily accepted those terms and conditions when joining Respondent. Also, the Tribunal will refer to paragraphs 11(1), 11(9), 12(1) and 12(7) of the Public Transport (Buses) Workers (Remuneration Order) Regulations 2008 (First Schedule – Traffic Section) which read as follows:

***11(1)*** *"Every monthly paid worker who has attended work on 230 days in any continuous period of 12 months shall be entitled, at his request, to 14 working days' leave with pay in the following period of 12 months."*

***11(9)*** *"For the purposes of subparagraph (1) -*
*(a) absences on sick leave or annual leave;*
*(b) where a worker is not entitled to sick leave or annual leave, a maximum of 14 days' medically certified absences;*
*(c) absences due to suspension from duty on disciplinary grounds; or*
*(d) absences on days where a cyclone warning class III or IV is in force, unless the worker forfeits his day's pay under paragraph 2(8)(b) or (c);*
*shall be deemed to constitute attendance at work."*

***12 (1)*** *"Where any monthly paid worker works for 230 days in any continuous period of 12 months, he shall be entitled during the following period of 12 months to -*
*(a) 21 days' sick leave on full pay; and*
*(b) a further period of 30 days' sick leave on half pay provided that -*
*(i) he is admitted to a clinic or hospital; or*
*(ii) a medical practitioner of a clinic or hospital certifies that the worker needs time for the recuperation of his health after his discharge from the clinic or hospital."*

***12(7)*** *"For the purposes of subparagraph (1) -*
*(a) absences on sick leave or annual leave;*
*(b) where a worker is not entitled to sick leave or annual leave, a maximum of 14 days medically certified absences;*
*(c) absences due to suspension from duty on disciplinary grounds; or*
*(d) absences on days where a cyclone warning Class III or IV is in force, unless the worker forfeits his day's pay under paragraph 2(8)(b) and (c),*
*shall be deemed to constitute attendance at work."*

Absences on sick leave or annual leave shall be deemed to constitute attendance at work and will be counted to arrive at the number of days of attendance at work for determining entitlement to annual and sick leave. Even overseas leave shall be deemed to constitute attendance at work for the purposes of annual and sick leave (as per Regulation 7 of the same GN No. 76 of 2008). Thus, the qualification in terms of the number of days a worker must have attended work before he or she is entitled to annual or sick leave cannot be viewed as a major impediment. If a worker has used his 14 annual leave and 21 sick leave (with the authorisation of Respondent), he would actually have to work only 195 days in that twelve months' period to qualify for annual and sick leave for the next twelve months' period. This represents only some 4 days per week.

For all these reasons, the Tribunal DECLINES to award that Respondent should grant every worker who is employed on monthly basis as from 5th May 2008 'Annual and Sick Leave' after completed two years of service on monthly basis without 230 days attendance at work as qualification for entitlement for the said leave.

**(Sd) Indiren Sivaramen**
**Vice-President**

**(Sd) Geeanduth Gangaram**
**Member**

**(Sd) M.P.J Henri de Marassé-Enouf**
**Member**

**(Sd) Hurryjeet Sooreea**
**Member**

**9 January 2012**