

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 12/12

AWARD

Before:

Rashid Hossen	-	President
Christian Bellouard	-	Member
Philippe Edward Blackburn	-	Member
Hurryjeet Sooreea	-	Member

In the matter of:-

Mr Ng Cheong José Li Yun Fong (Disputant)

And

The Bank of Mauritius (Respondent)

This is an arbitration referral emanating from the Commission of Conciliation and Mediation.

On 18th March 2011, Disputant, Mr Ng Cheong José Li Yun Fong, reported to the Commission for Conciliation and Mediation the existence of a labour dispute between himself and the Respondent, the Bank of Mauritius

as per **Section 64 (1)** of the **Employment Relations Act 2008**. Conciliation meetings were held at the Commission and no settlement was reached.

Mr Yousuf Mohamed, Senior Counsel, appeared for the Disputant. The Bank of Mauritius was legally represented by Mr Rishi Pursem, Senior Counsel.

The Terms of Reference read as follows:-

- “(i) Whether following an organization restructure exercise carried out by the Management of the Bank of Mauritius during the year 2007/2008, the latter was warranted to demote me from the grade of “Assistant Director” IT Department to a lower grade of “Chief IT” with a lower salary assigned to the Assistant Director’s grade.*

- (ii) Whether the Management of the Bank of Mauritius should withhold my increment for the year ending 30 July 2009, following the salary review exercise carried out in September 2009.*

- (iii) Whether the monthly responsibility allowance (Rs 2000) paid to me from February 2000 to May 2001 should have continually been paid to me after my nomination as Assistant Director on 15 May 2001 while I was still performing the duties of the Director who retired from the Bank.”*

The Disputant resubmitted a Statement of Case that was filed in a previous case before the Tribunal on 29th November 2011 and which contained the following four disputes.

- “(i) Whether following my suspension in March 2008 and my subsequent reinstatement on 6 October 2008, the Management of the Bank of Mauritius should be discriminatory against me and whether all my rights as Assistant Director Information Technology (IT) Division should be restored.”*
- (ii) Whether following an organization restructure exercise carried out by the Management of the Bank of Mauritius during the year 2007/2008, the latter was warranted to demote me from the grade of “Assistant Director” IT Department to a lower grade of “Chief IT” with a lower salary assigned to the Assistant Director’s grade.*
- (iii) Whether the Management of the Bank of Mauritius should withhold my increment for the year ending 30th July 2009, following the salary review exercise carried out in September 2009.*
- (iv) Whether the monthly responsibility allowance (Rs 2,000) paid to me from February 2000 to May 2001 should have continually been paid to me after my nomination as Assistant Director on 15 May 2001 while I was still performing the duties of the Director who retired from the Bank.”*

On the 9th May 2012 Counsel for the Disputant moved that abstraction be made of dispute no. 1 so that disputes no. 2, 3 and 4 in that previous Statement of Case should now be read as disputes no. 1, 2 and 3 in accordance with the present Terms of Reference. It is a matter of regret that Counsel did not advise his client to file an updated Statement of Case instead of referring to a previous one, an exercise which may lead to confusion.

With regard to dispute no. 1, Disputant avers in his Statement of Case that in 2007, the Management of the Bank of Mauritius decided to carry out a restructure of the organisation of the Bank. Prior to that restructure exercise, Disputant was ranked 10th in the Bank's hierarchy in terms of title and seniority. The Bank's organisation chart was based on departments with 3 Directors, 7 Assistant Directors starting from top as Governor, Deputy Governors, Directors and Secretary, Assistant Directors and finally Managers. Disputant was reporting directly to the Managing Director subsequently restyled as "First Deputy Governor". With the appointment in February 2007 of Mr R. Bheenick as the new Governor, Mr Y. Googoolye as First Deputy Governor and Mr J. Khadaroo as Second Deputy Governor, Disputant has been reporting directly to the Second Deputy Governor. Management nominated 15 new Heads of Divisions and 26 Chiefs of Divisions in the new structure which has never been approved by the Board of Directors. Following new restructure exercise, the top hierarchy of the Bank starts with the Governor, Deputy Governors, Secretary and Chief Economist, Heads and Chiefs. All Assistant Directors and Managers had been removed by Management without the approval of the Board. Disputant further averred that on the 10th October 2007, the Governor called him in his office in the presence of the First Deputy Governor and convinced him to apply for the post of Chief IT Division on condition that, that new post will carry the same salary scale as that of the Head of Divisions. Disputant averred that he had no other alternative than to abide and apply for the post of Chief IT under the firm impression that all his rights and benefits inclusive of his salary and allowances would be on the same scale as Heads of Divisions. The said condition was spelled both in his application for the post of Chief IT and in his acceptance letter addressed to the First Deputy

Governor dated 15th November 2007. In April 2009, the Salary Restructure and Conditions of Service exercise were assigned to Mr B.C. Appanna as a private Consultant and which salary review created different grades of Chiefs and Heads. According to the Bank's Unions all "Chiefs" should draw the same salary just like all Heads of Divisions should earn the same salary. On the 7th September 2010, the Management of the Bank applied the rule that all Chiefs and Heads of Divisions should earn the same salary with only one exception in the case of the Disputant. Since then, Disputant has been placed on a salary scale created by Management without the approval of the Board under the title "Chief IT (Personal)" instead of the salary attached to the scale of Assistant Directors equivalent to Heads of Divisions. On the 17th February 2011, the Bank issued a circular informing staffs that the post of Assistant Director IT had been restyled as Chief IT. Disputant averred that this amounts to an unjustified unilateral demotion from the rank of Assistant Director IT Department to a lower grade of Chief IT. Disputant is therefore appealing to the Tribunal to rectify this anomaly and that he now be put on a salary scale of an Assistant Director IT equivalent to the scale of Heads of Divisions and is also claiming all arrears due to him since July 2009.

With regard to the second dispute, Disputant averred that prior to the salary review effected in September 2009 approved by the Board of Directors of the Bank, he had already reached the top salary scale in the grade of Assistant Director and was entitled to an increment in July 2009. This was suppressed without any reason given to the Disputant when all other Assistant Directors earned same. Disputant made representations to Mr B.C. Appanna, the salary Consultant and no explanation was

forthcoming. According to the terms and conditions of service at the Bank, Disputant should have been informed in writing at least 15 days before the incremental date i.e. 15th June 2009 as to the reasons why his increment could not be paid to him. He was also to be given the opportunity to show cause why his increment should be paid. Management never abided to this condition. On the 15th June 2010 i.e. one year after, the Head Corporate Services informed Disputant that his work performance was not satisfactory for the period 1st July 2009 to 15th June 2010 and that Management has decided to defer his annual increment for that year for a further period of three months. On the 18th June 2010 Disputant wrote to the Head of Corporate Services and strongly disagreed with the latter's decision. Disputant is requesting the Tribunal for the restoration of his increment for the year 2008/2009 together with all arrears due.

In relation to the last dispute, Disputant averred that he was paid a monthly responsibility allowance of Rs 2000 from February 2000 to May 2001 while he was the IT Manager and performing the duties of the Director IT. The Director IT retired from the Bank and Disputant was nominated Assistant Director IT on 15th March 2001 while still performing the duties of the Director IT. He had made several queries to the Secretary of the Bank, at that time Mr A.K. Prithipaul, for the responsibility allowance to be restored since he was still performing the duties of Director. Disputant averred that the Bank unfairly suppressed his monthly responsibility allowance and is requesting the Tribunal for it to be restored as from May 2001.

The Respondent at least took care in filing a fresh Statement of Case. With regard to the first dispute, it avers that in February 2007 the Bank, with the approval of the Board of Directors embarked on a major restructuring exercise to meet new challenges facing Central Banks and it was a step by step exercise. Expressions of interests for the various posts were invited for members of the staff or from outside applicants except for the posts of Chiefs and Heads which were restricted to members of the staff only. Candidates were evaluated on specific criteria by an interview panel. During the restructuring exercise, the post of Chief IT was created and the holder thereof was expected to report to the Head Corporate Services. On 10th October 2007, the Bank invited expressions of interests from qualified serving officers who were to be considered for such appointment. Mr Li Yun Fong who at that time was holding the post of Assistant Director IT expressed his interest for the post and applied for it. He was appointed after having successfully gone through the interview exercise. Respondent averred that Disputant's claims of demotion are baseless.

Respondent further averred that in April 2009, the services of Mr Appanna were enlisted by the Bank to conduct a review of salaries of staff. Mr Appanna made recommendations on the review of salaries of employees holding a substantive post on –

- (i) the organisation structure obtainable in the year 2006, i.e. prior to the restructure exercise and
- (ii) the new organisation structure, i.e. after the restructure exercise.

The Board members rejected the report and Mr Appanna was requested to come up with another report which was eventually implemented. Disputant averred that since the second report was based on the organisation structure prevailing before the restructure exercise of 2007, Disputant drew the salary in the scale applicable to the post of Assistant Directors and Head:

BOM 2: Rs 73000 x 3000 – 94000 x 3500 – 104500

Assistant Director

Head.

The implementation of the second report led to a string of litigation before the Supreme Court and other labour institutions. On 24th March 2010 the Supreme Court delivered a judgment delineating the duties and powers vested on the board and on the Management of the Central Bank. Following representations made by staff members of the Bank to the Ministry of Labour and Industrial Relations and Employment, the Ministry informed the Bank of the necessity to implement the principle of 'equal pay for equal work'. The Bank accordingly implemented the first report of Mr B.C. Appanna which addressed all the issues in contention and provided for the review of salaries of employees holding a substantive post on the new organisation structure i.e. after the restructure exercise. Respondent further averred that the implementation of the first report restored the rights of all staff members. It has taken due consideration of the case of the Disputant and has recommended that a salary scale similar to that awarded to Assistant Director /Head in the second report be granted to the Disputant i.e.–

BOM 3: Rs 73000 x 3000 – 94000 x 3500 – 104500

Chief IT Section (Personal)

Formerly Assistant Director, IT.

Disputant is accordingly drawing the same salary which he was drawing under the second report.

With regard to the second dispute, Respondent averred that in March 2008, the Bank instituted disciplinary proceedings against Disputant as Chief IT who had committed an act of insubordination and behaved in a very hostile manner towards his superiors. He had refused to divulge the Administrator Password of the IT system to his hierarchical superior under close cover. The charges were levelled against Disputant and he was eventually suspended from duties. The disciplinary committee was chaired by Mr Denis Vellien, former Magistrate and met on eight occasions. Respondent averred that the last meeting of the Disciplinary Committee was held on 30th September 2011 and no further meeting of that Committee was held as the Board, in the absence of the Governor and acting *ultra vires* and beyond the powers conferred upon it under the Bank of Mauritius Act, resolved that the proceeding against Disputant be stalled and his suspension terminated. Disputant was accordingly reinstated in his post following the Board's decision on the 6th October 2008. Respondent averred that annual salary increments are paid to staff members subject to the bank being satisfied with their work performance. In view of the fact that the Disputant was suspended in that year and the Bank was later compelled to reinstate him in his substantive post, the Bank did not pay him his annual salary increment for that year. It is averred that the fact that disciplinary

proceedings were stopped does not entail that he automatically becomes entitled to the increment. Disputant was not granted increment in July 2009 as he was not yet confirmed in his post of Chief IT. Disputant had reached his top salary in July 2008 and was as per the recommendations of the Salaries Commissioner granted one increment to compensate him thereof and this compensation was duly paid to him in January 2010.

The Respondent averred with regard to the third dispute that Disputant was appointed as Analyst Programmer at the Bank in January 1993 and Senior Analyst Programmer with effect from 1st July 1997. On 16th September 1998, he was offered posting as Manager IT which he accepted on 17th September 1998. During the period February 2000 to May 2001, he assumed the responsibilities of the Director IT who had been suspended during that period of time. On 7th May 2001, Disputant was appointed Assistant Director Information Technology. While the Disputant assumed the responsibilities of the Director IT he was granted a responsibility allowance inasmuch as he was shouldering additional responsibilities. In May 2001 since he was appointed Assistant Director IT and since he was shouldering responsibilities commensurate with his post, the Bank stopped payment of the allowance to him.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

The Disputant confirmed the contents of his Statement of Case making abstraction of the first dispute and relying on the second, third and fourth disputes. Before he was appointed to the new post he was the Assistant Director-IT Department. He also confirmed that he stands by all

the documents he had annexed to his Statement of Case. He confirmed there was a disciplinary committee set up for hearing certain specific charges mentioned in the Statement of Case of the Bank. All the charges were dropped as from 30th September 2008. He was asked to resume his duties after his suspension. He was not granted any increment apart from the one which Mr Appanna granted to all the staff of the Bank during the salary review exercise. He was not granted any increment from 2009 to the present date. According to the terms and conditions, the Bank should have informed him 15 days prior to the incremental date and he should have been given the chance to show cause why the increment should have been granted to him. He was never given the chance. It was a year later that the Bank informed him in writing that he had to improve his work standard. That letter refers to numerous alleged verbal requests which Disputant denied having ever been made to him. He wrote to the Bank and informed Management of his objection with regard to the remarks contained in the Bank's letter. In relation to the averment that Disputant was not granted increment in July 2009 as he was not yet confirmed in his post of Chief IT, Disputant stated that the probation period was for one year and he was appointed as Chief IT in November 2008 i.e. from Assistant Director IT to Chief IT. On the 10th October 2007 the Governor and the First Deputy Governor called Disputant in the office of the Governor where the latter urged Disputant to apply for the post of Chief IT and further informed him that the salary scale of Chief IT would be similar to that of Head Corporate Services. Disputant was however not made Head and he has instead to report to the Head of Corporate Services. Prior to the restructuring exercise the post of Director IT was never filled and after the restructuring exercise there was a provision for the post of Head of IT which has not been filled. According to

Disputant, the duties of Director IT and that of Chief IT are the same. He was appointed Assistant Director IT in 2001 and Chief IT in 2007 and apart from this change of title Disputant has been doing exactly the same job. In a letter dated 15th November 2007 addressed to the First Deputy Governor Disputant mentioned that he had been given assurance that the probationary period would not apply in case he was appointed Chief IT. Still he was to be on probation in spite of his protest.

With regard to the last dispute, Disputant stated that he was given a responsibility allowance as he was also performing the job of Director IT and the Director was suspended. According to him the monthly responsibility allowance of Rs 2000 paid to him from February 2000 to May 2001 should have continued after his appointment as Assistant Director on 15th May 2001 as he was still performing the duties of Director IT although not holding a substantive appointment. He referred to the schedule of duties whereby he was to assist the Director in the management of the Information Technology Department and in fact there was no Director. He was also to formulate together with the Director an appropriate integrated IT plan for the Bank. Disputant further stated that during the restructuring exercise one of his juniors, Mr Dhaneshwar Thakoor, who was Senior Analyst Programmer, was promoted to Head of the MCIB i.e. Mauritius Credit Information Bureau and Payments System Division. Disputant protested about this but in vain.

All in all Disputant summarised his misfortune by finding himself stuck as Chief IT (Personal) while all his colleagues who were at the same level as him got promoted to the rank of Head including more junior staff

and Disputant feels he has been discriminated or ignored in the restructuring exercise. He believes this may be a sanction for having testified against the Governor in a Fact Finding Committee.

Mrs Hemlata Sadhna Sewraj-Gopal, a witness for the Disputant stated that she is aware that the Disputant had applied for the post of Chief IT. Disputant was holding the post of Assistant Director-IT which was actually a higher post whereas the post of Chief IT was equivalent to the post of Manager which was a lower post and that issue was raised with Management. According to that witness, Disputant made an application on the understanding that the terms and conditions of the post to which he had applied would in no terms be detrimental to him. At that time the witness was the Secretary of the Bank and was then in charge of administration.

Mr Jayendra Kumar Ramtohul, is the head of Corporate services since January 2011 at the Bank of Mauritius. He testified to the effect that Disputant held the post of Manager and had discharged the duties of Director up to 2001 when he was appointed Assistant Director. Whilst stepping in the shoes of the Director who had been suspended, Disputant was being paid a responsibility allowance. He admitted that Disputant had ceased to receive the allowance upon his appointment as Assistant Director. According to him the responsibility allowance was given because Disputant was deriving a lesser salary as Manager than an Assistant Director. But as Assistant Director he is supposed to step in the shoes of the Director whenever the Director is not available and this does not necessarily mean that he is expected to perform more. In 2007 there was the restructuring exercise whereby members of staff were invited to apply for posts which had

been newly created during that year. Disputant applied for the posts of Head Corporate Services and he was not appointed. It was one Mr Sooben who was appointed. At that time it was known that the Chief IT would be accountable to the Head Corporate Services as the organigram was on the intranet. Following the restructuring exercise the post of Director-IT disappeared and the Head of Corporate Services became in charge of the IT Department. Disputant was appointed Chief IT. Prior to 2007 there were only Assistant Directors and Directors but no post of Head with the exception of one at the Banking Currency Department and Mr Vijay Kumar Sonah was posted there. It was a question of reporting line whereby others would report to him and for all intents and purposes he remained an Assistant Director with regard to salary, benefits and status. There was therefore only one Head who was at par with the other Assistant Directors. When the restructuring exercise was underway it was necessary to distinguish the Head prior to 2007 and those to come. With the departure of Mr Vijay Kumar Sonah, it was Mr Doobree who was appointed Head of Banking Currency so that he became Head of that department in the old structure. When the new structure was being implemented, the post of Head Banking Currency was advertised. There was already a Head Banking Currency under the old appellation and when this post was being advertised it was different from the one that already existed. For some reason Mr Doobree did not apply for the new post while others did so through interview. Mr Anil Tohooloo was appointed Head Banking Currency. That Head is not in the new structure. The previous Head is not at par with the new one and this is an exceptional case. The Appanna's Report made it clear that Mr Doobree was put on a scale personal to him. The Salary Commissioner came up with an initial report which is dated July 2009. That

report was rejected and the Salary Commissioner came up with a second report in August 2009. Volume I of the August Report refers to Assistant Director and Head at page 21. Assistant Director BOM 2 refers to the post that existed prior to the new structure and the Head referred to us was the only post of Head that existed prior to 2007 and which was equivalent to the post of Assistant Director held by Mr Vijay Kumar Sonah and taken over by Mr Doobree. In August that year there was a judgment of the Supreme Court that dealt with the divisional powers of Management and the Board. At page 27 of the July Report which was applied eventually following the additional recommendations of the August Report, reference is made to BOM 2 –

BOM 2: Rs 73000 x 3000 – 94000 x 3500 – 104500

Assistant Director

Head

[Document (C)].

The witness stated that the same document refers to BOM 3 at page 33 and it reads as follows:-

BOM 3: Rs 73000 x 3000 – 94000 x 3500 – 104500

Chief, IT Section (Personal)

formerly Assistant Director, IT.

Chief IT at BOM 3 is the post held by the Disputant. The word ‘Personal’ is written in bracket and added to it are the words ‘*formerly Assistant Director, IT*’. The Head in BOM 2 at page 33 is the Head that came into existence after the implementation of the new structure starting from

September 2007 and not all Assistant Directors were promoted to that Head. BOM 2 at the same page shows two Heads, one is Head and the other one refers to the former Director Legal Section/Changed Management Head IT and the scale goes beyond Rs 104500. BOM 3 is now equivalent to the post held by the Disputant i.e. to the Assistant Director in the old establishment. There was a post of Chief IT which was advertised in the wake of the new structure and Disputant applied for that post and was appointed and this cannot amount to a demotion. The witness has not been stripped of his title nor is he getting benefits which are less favourable than before. Disputant's salary scale is personal to him and any new Chief appointed will be on a lower salary scale. The July Report deals with both posts which existed prior and post 2006. With reference to Mr Thakoor the witness stated that although he has been appointed Head of Payments System Division and MCIB, he receives less than Disputant in terms of salary package. Also, when Mr Thakoor was appointed Head, he had joined at the initial salary scale at BOM 2 and given that Disputant had already been appointed well before Mr Thakoor on that scale, Mr Thakoor can in no way earn a higher salary.

SUBMISSIONS

Mr Yousuf Mohamed, Senior Counsel submitted in writing that Disputant has nearly 20 years of loyal service at the Bank of Mauritius. During his career at the Bank, he has gradually climbed up the hierarchy from Analyst Programmer to Assistant Director. Prior to the restructure exercise of the Bank in 2007 he was ranked 10th in the hierarchy of the Bank in terms of title and seniority. With the appointment of Mr R. Bheenick in

February 2007, a restructure exercise was carried out and 15 new Heads and 26 Chiefs were appointed.

Disputant was made to apply for the post of Chief-IT with the promise by Management, precisely by Mr Bheenick the Governor, that the post will carry the same salary scale as that of Head of Corporate Services. The condition was clearly spelled out in Disputant's application and acceptance letters for the post of Chief-IT. The fact that Disputant was called for an interview means that Management already agreed that the post of Chief-IT would carry the same salary scale than that of Heads. This fact was ushered in evidence by Disputant and was not denied or rebutted by the Respondent.

Following the restructure exercise of 2007 and the application of the first Appanna Report (dated July 2009), Disputant was put on a scale that is lower than that of Heads. During the restructure exercise all Assistant Directors, except Disputant, were promoted to the rank of Head, even one of his juniors (Mr Thakoor) went past him in the hierarchy of the Bank. Mr Ramtohul claimed that Mr Thakoor can in no way earn a higher salary than Disputant. The fact that Mr Thakoor is on scale BOM 2 with top salary being Rs 112,000 and Disputant has been put on a lower salary scale of BOM 3 with top salary being Rs 104,500, Mr Thakoor will at some stage earn a higher salary than Disputant. Consideration should also be given that the increments of Disputant have been frozen.

It is further submitted that the fact that Disputant has been moved from a salary scale of BOM 2 to BOM 3, after the application of the first Appanna Report constitutes a demotion. At the sitting of 16 August, the

Bank has provided Disputant's salary scale (Doc. F) prior to the salary review in order to make the Tribunal believe that there has been a huge salary increase for Disputant after the application of the first Appanna report. The report in fact deals with the promotions in the restructure exercise as well as the salary review. In fact the report has confirmed the demotion of Disputant.

It is submitted that in all fairness the Tribunal should award that Disputant be put on the same scale as Heads (i.e. Rs 76,000 x 3,000 – 94,000 x 3,500 – 108,000 x 4,000 – 112,000) and that all arrears due to him since July 2009 be made payable to him.

Counsel referred to the Award delivered on 12 November 2008 in the case of **Mrs Lee Yeung Chong Ah Yan v/s Air Mauritius Ltd. (RN 974)**. He prays that the Tribunal orders redress as the rights of the Disputant have been trampled upon.

On the issue of increments, Counsel submitted that Mr Ramtohul, representative of the Bank clearly acknowledged that the procedures as per the terms and conditions regarding the suppression of increments at the Bank had not been followed by the Respondent. Moreover, contrary to what was stated in the Bank's Statement of Case, Disputant was not on probation when the Bank started suppressing his increments as from July 2009. Counsel invited the Tribunal to correct this injustice by ordering the payment of increments due to Disputant from July 2009 to date, based on the BOM 2 salary scale of the July 2009 Appanna report.

With regard to the responsibility allowance, it is submitted that from February 2000 to May 2001, Disputant was paid a monthly responsibility allowance of Rs 2,000 for performing the duties of the Director IT who had retired from the Bank. Since May 2001 till now the post of Director IT has not been filled and Disputant is still performing the duties of the Director. However, Disputant has stopped receiving the monthly responsibility allowance. Mr Ramtohil acknowledged that the Bank has stopped paying the monthly responsibility allowance and the Bank is willing to consider granting the monthly responsibility allowance due to Disputant since 2001. Therefore, Tribunal can award that the Bank will have to pay the appropriate responsibility allowance (which must now be more than Rs 2,000 after the salary review) due to Disputant from 2001 till now.

In his written submission, Mr Rishi Pursem, Senior Counsel, drew the Tribunal's attention to the following:-

With regard to the first dispute, the case of the Bank is that the Disputant has not been demoted from the grade of "Assistant Director" IT Department to a lower grade of "Chief IT" inasmuch as:

- (a) although the post of Assistant Director fell within the salary scale of BOM 2 prior to the restructuring exercise, a new set of post "Head" under the new structure was created and assigned under BOM 2.
- (b) those who aspired to be appointed as Head under BOM 2 had to apply and not all those who applied were appointed.

- (c) Disputant applied for the higher post of Head, but was not appointed.
- (d) a post of Chief IT was created under the new structure.
- (e) Disputant, not having been appointed Head, applied for the post of Chief IT.
- (f) it is not correct to say that the post of Chief IT is lower in grade to the post of Assistant Director.
- (g) the post of Assistant Director is not equivalent to the newly created post of Head.
- (h) Disputant is not the only person who held the post of Assistant Director who has not been appointed to the higher post of Head.
- (i) the Head, Banking and Currency (which was a post equivalent to the post of Assistant Director) was not appointed to the post of Head in the new structure and kept a post which was equivalent to the post of Assistant Director.
- (j) both Disputant as Chief IT and the Head, Banking and Currency fall within the Salary Scale under BOM 3: Rs 73000 x 3000 – 94000 x 3500 – 104500.

It is therefore submitted that Disputant was not demoted to a lower grade inasmuch as the post of Assistant Director was abolished and he was

appointed to a post of Chief IT which before and after the Salaries Commissioner's Report was treated at par with Assistant Director.

The Bank was perfectly entitled to create a new post in the new structure which ranked higher than the post of Assistant Director the more so as the Disputant was given an opportunity to apply for the new post which he unfortunately failed to secure.

Should the Tribunal accede to the claim of the Disputant it would be tantamount to bringing the post of Chief IT at par with the post of Head. This would defeat the purpose of creating a higher post of Head. Further, it would be unfair firstly to those who have been appointed as Head since they had to apply and undergo an interview and the ultimate effect would be that the Disputant would be appointed to the post of Head through the back door. It would also be unfair and unjust to Mr Doobree, who kept his post of Head, Banking and Currency under BOM 3 in the new structure after his application for the post of Head under BOM 2 had not been acceded to.

With respect to the issue whether he draws a salary which is lower to that of an Assistant Director's grade, it is submitted that the contention is clearly incorrect inasmuch as:

- (a) As Assistant Director IT the Disputant was drawing a salary in the Salary Scale of Assistant Directors and Head (the Head refers to Head, Banking and Currency held by Mr D Doobree) as follow: Rs 43000 x 1400 – 46000 x 1500 – 53500.

(b) From the time Disputant was appointed Chief IT he drew a salary along the scale referred to in paragraph (a).

(c) In the Report of the Salaries Commissioner of August 2009 (page 21 of Document D) the salary scale was increased and the revised salary scale was under BOM 2: Rs 73000 x 3000 – 94000 x 3500 – 104500.

(d) In the Report of the Salaries Commissioner of July 2009 (page 33 of Document C) the revised salary scale was under BOM 3: Rs 73000 x 3000 – 94000 x 3500 – 104500.

As regards the alleged promise which the Governor made to the Disputant, even assuming that the Governor made that promise, it is submitted that the Governor could not have done so because the question of salary and pay structure is a matter which falls within the province of the Salaries Commissioner whose terms of reference are determined by the Board of Directors of the Bank. If the Disputant were to be believed it would have required the Governor to interfere with the salary review exercise. The effect of reviewing the salary and pay structure of the post of Chief IT would be tantamount to putting in question not only the Bank's restructure exercise but also the recommendations of the Salaries Commissioner.

As regards the second dispute, it is submitted that the Bank is not bound to pay the salary increment for the year ending June 2009 inasmuch as the Disputant had not yet been confirmed in his post of Chief IT.

In relation to the last dispute, it is submitted that, in line with established practice at the Bank, the Bank is not bound to pay to the Disputant the responsibility allowance following his appointment as Assistant Director, IT in May 2001 inasmuch as he was shouldering responsibilities commensurate with his post.

ASSESSMENT AND CONSIDERATIONS

Dispute No. 1

(i) The Governor's promise

The Disputant contends that he applied for the post of Chief IT because he was promised that it would be on the scale of Head. BOM 3 in the first report i.e. July Report became BOM 2 in the August Report. BOM 3 in the first report carried a salary of Rs 73,000. It was the July Report 2009 that was implemented following certain disputes that arose so that Disputant who was for one year on BOM 2 was put on BOM 3. In the July Report (Document C) there was a creation of a Head IT (new grade) and Disputant did not get it simply because he did not apply for the post.

The whole tenor of Disputant's case with regard to his appointment pivots around the issue of the promise made to him by the Governor of the Central Bank. Although **Section 20(1)** of the **Second Schedule** to the **Employment Relations Act 2008** provides that the Tribunal "*shall not be bound by the law of evidence in force in Mauritius*", we consider that relying on such unsupported piece of evidence would

lead us to treading on dangerous path. Not applying the law of evidence cannot make room for the law of the jungle. Although the evidence of Disputant in relation to what the Governor had stated to him is not rebutted, its probative value remains weak. The letter of offer made to the Disputant although referred to on a number of occasions was not made available to the Tribunal. The lady witness called to support the Disputant's case is far from being a supporting witness. Indeed, she was not a party to the meeting between Disputant and the Governor although then as Secretary of the Bank in charge of administration she could confirm that the post of Assistant Director IT was higher than the post of Chief IT which was equivalent to the post of Manager.

The Governor's promise, if any, would amount to a clear breach of the principle of good governance (the pun is incidental). It would be a display of unfairness towards other participants and an exercise unexpected of any Governor responsible for the good affairs and business of a Central Bank. We wish to bring home that if such a promise had been made, the Disputant is as much to be blamed for allowing himself not only to be duped by the Governor but in participating to a conspiracy that prejudices the chances of other participants. We expect somebody of his status to understand perfectly well that an application to a post as high as Head cannot be based on verbal promises and in such circumstances as he has advanced.

(ii) **Demotion (Rétrogradation)**

We do not consider that the Disputant has been subject to a demotion given that he chose to apply for the post of Chief IT. In our law a “*rétrogradation*” implies –

“... une modification unilatérale des conditions auxquelles le contrat de travail a été originellement souscrit...”

(Dalloz, Encyclopédie de Droit Social, vo. Contrat de travail, n. 195).

We do not see any “*modification unilatérale*” when Disputant in fact applied for the post albeit following a promise he chose to rely upon.

Furthermore we fail to see in what way the post of Chief IT is lower than the post of Assistant Director.

The Tribunal does not find cause to intervene on this dispute and the dispute is set aside.

Dispute No. 2

The Human Resource Manager of the Bank of Mauritius made no reference to the withholding of Disputant’s increment for the year ending 30 July 2009 in examination in chief. What is averred in the Bank’s Statement of Case and as stated earlier is a reference to disciplinary proceedings instituted in March 2008 against Disputant who allegedly had committed an act of insubordination. Disputant was suspended from his duties on full pay and disciplinary proceedings started against him. Those proceedings were

stalled and his suspension was terminated. Disputant was reinstated in his post on 6 October 2008. The Statement of Case avers that annual salary increments are paid to staff members subject to the Bank being satisfied with their work performance. It is further averred that in view of the fact that Disputant was suspended in that year and the Bank was later compelled to reinstate him in his substantive post, the Bank did not pay him his annual salary increment for that year. The Bank avers that it is not bound to pay the increment. Furthermore it is averred that Disputant was not granted increment in July 2009 as he was not yet confirmed in his post of Chief IT. The Bank further averred that since Disputant had reached the top salary in July 2008 and he was as per the recommendations of the Salaries Commissioner granted one increment to compensate him thereof. This compensation was duly paid to him in January 2010.

The Bank's stand regarding the non-performance of the Disputant cannot stand following its decision to waive the suspension and to stop all disciplinary proceedings instituted against Disputant.

Section III of the terms and conditions at the Bank provides:-

“Increments

- (a) No employee shall draw any increment as of right but shall be eligible for it with the approval of the Managing Director upon the recommendation of the Head of Department in which the employee is posted. The recommendation should be forwarded to the Managing Director through the Manager-Human Resources at least one month before the employee becomes eligible for the increment.

- (b) The incremental date for officers on the permanent and pensionable establishment drawing salary in a scale shall be the 1st of July. For employees appointed on probation the incremental date shall be the date of confirmation. Thereafter the incremental date shall be the 1st of July.
- (c) Where for any reason it is decided not to grant an increment to an employee on the date he becomes eligible for it, the employee should be informed, in writing, at least 15 days before the incremental date and should at the same time be given an opportunity to show cause why his increment should not be withheld.”

The Tribunal addressed the issue of annual increment in *State Informatics Ltd Staff Union and State Informatics Ltd, (RN 854)*.

“... In the matter of **Ireland Blyth Ltd Staff Association and Ireland Blyth Ltd (January 1980)**, the Tribunal held: “A yearly increment in an employee’s salaries, in the opinion of the Tribunal is something due to him at the beginning of each year. The Tribunal does not appreciate the terms “merit increment” used by the Employer as it considers that, from a moral and equitable point of view, a yearly increment is due to an employee after a 1 year of loyal and efficient service. In case of dishonesty, disloyalty or inefficiency on the part of an employee, the Employer has always the alternative of applying disciplinary sanctions or dispensing with his services for valid reasons. The Tribunal notes, however, that the Employer has not adduced any evidence to that effect during the course of the proceedings.” Similarly and to the extent that Annual Increment in the present case had been given constantly and specifically on a fixed scale, we can say that it is an acquired right subject to adverse reports. Indeed, the principle of it cannot be taken away since the right to be at least considered for it is acquired. We find no evidence of any performance appraisal exercise effected on those whose Annual Increments had been withheld, and should therefore be refunded....”

Increment is paid “...*en exécution d’un usage constant auquel les contractants doivent être présumé avoir adhérer*”

(5 aout 1941, *Gaz.Pal.1941.2.274*).

Les Primes

“863 **Variété** – S'impose, ici, la même remarque qu'à propos des gratifications : on rencontre, sous ce vocable, des pratiques très diverses. Les syndicats de salariés dénoncent leur prolifération, leur danger (prime de rendement, prime d'assiduité) et revendiquent leur intégration pure et simple dans le salaire, c'est-à-dire leur remplacement par des augmentations du salaire de base.

- 1) La plupart sont inspirées par le souci de l'employeur d'obtenir un résultat: production accrue, de meilleure qualité, et au moindre prix de revient: *primes de rendement*); consistant en un supplément proportionnel à l'élévation de la production (et qui manifeste la survivance partielle du salaire au rendement) ; *primes d'objectifs* récompensant la réalisation de ceux-ci; *primes à la régularité*, dans les transports ; *boni de chantier* dans les entreprises de bâtiment lorsqu'un chantier est achevé avec de l'avance.
- 2) D'autres entendent récompenser – donc encourager – la fidélité du salarié à l'entreprise : *primes d'ancienneté* en fonction du temps passé dans l'entreprise et destinée à encourager la stabilité du personnel; *prime d'assiduité* destinée à combattre l'absentéisme, aux allures de «prime anti-grève».
- 3) Certaines sont apparemment justifiées par les conditions d'exécution du travail, telle la prime de *pénibilité* (travail dans le froid ou la chaleur, travail au fond des mineurs et en hauteur des ouvriers du bâtiment) ou d'*insalubrité*, ou d'*éloignement* (d'*expatriation* parfois).
- 4) Nombre de «primes», enfin, constituent plutôt des gratifications (primes de vacances, de fin d'année, de rentrée scolaire, de bilan), dont la qualification et le régime ont déjà été examinés, et qui ont la particularité de n'être jamais versées mensuellement.

864 **Nature juridique et régime** – Ces diverses primes, fréquemment prévues par les conventions collectives de travail, faisant assez souvent l'objet d'un usage, mais naissant parfois d'un engagement unilatéral de l'employeur, et parfois prévues par le contrat individuel, constituent une partie du salaire soumise à son régime juridique, dès lors qu'elles présentent un caractère de périodicité. Les conditions de leur qualification d'éléments de rémunération et leur régime sont analogues à ceux

des gratifications (sauf pour ce qui tient à la périodicité, d'ordinaire annuelle, de ces dernières).

.....”

(Dalloz, Droit du Travail, Jean Pélissier, Gilles Auzero, Emmanuel Dockès 2012 26^e édition. P. 890-891)

We find it apposite to refer to **Y. Descelles v/s The Secretary to the Cabinet & Anor and Y. Descelles v/s The Public Service Commission & Anor [1980 SCJ 345]** where the Supreme Court stated, inter alia:-

“We agree that, in relation to a normal increment, the position now is that, unless the procedure traced out in regulation 42(1) is followed, an officer cannot be deprived of it.”

The procedures in the Terms and Conditions of the Bank regarding the suppression of increments were not followed by the Bank. Also there is no documentary evidence that Disputant was not confirmed in his post and the Tribunal finds that the Bank should have adduced evidence that Disputant had in fact been informed in writing of same.

We award that Disputant be paid the increment due to him in 2009.

Dispute No 3

It is not disputed that Disputant was being paid a responsibility allowance (Rs 2,000) for the period February 2000 to May 2001 for assuming responsibilities of the Director IT, who had been suspended during that period of time. His substantive post was that of Manager IT.

His job specification as Manager-IT Department included amongst others a duty to assist the Director in the day-to-day management of the department with a view to ensuring the achievement of the mission of the department. On 7th May 2001 he was appointed Assistant Director-Information Technology and his duty amongst others is to assist the Director in the management of the Information Technology Department. No Director has yet been appointed.

We note that his job specification has been enlarged as expected for a higher post. However, among the top duties he is expected to fulfil i.e. assisting the Director in the day-to-day management of the department, there is evidence from the Human Resource Manager of the Bank that Disputant may sometime be called to perform duties of Director and that there is no hard and fast rule about it. According to him, the Bank may be willing to consider the grant of such an increment. The Terms of Reference are in relation to the figure of Rs 2,000 on a monthly basis as Responsibility Allowance, a sum he was earning from February 2000 to May 2001.

It is not disputed that the established practice at the Bank before the implementation of the Appanna Report was as follows:-

- (a) An acting Allowance is paid to an employee of a lower grade who has, upon the recommendation of his Head, been appointed in an acting capacity to fill a vacant promotional post or if the holder of such an office is absent or is for any reason unable to perform the duties of his post. An acting appointment does not give the beneficiary any potential

claim for substantive promotion to the grade in which he is appointed to act, nor any right of preference over any other candidate or any right for automatic substantive appointment to the grade he is given to act.

- (b) However, where the designated employee does not possess the qualification of the higher post, he shall be paid a responsibility allowance, which shall be equivalent to 80% of the allowance payable to an incumbent who is fully qualified.

With the implementation of the Appanna Report, the payment of Responsibility Allowance was stopped such that as of now only acting allowances are paid to staff members who are called upon to act in higher capacity.

Given that the Disputant has now been appointed Assistant Director whereby any Responsibility Allowance would be based on the equivalence of 80% of the allowance payable to him thereby leading to a different sum, the Tribunal considers that it will go *ultra petita* if it were to grant the monthly sum of Rs 2,000 as per the Terms of Reference. In the present case the Responsibility Allowance necessarily depends now on the difference of salary between Director and an Assistant Director and not Manager anymore.

We therefore hold that the payment of a Responsibility Allowance of Rs 2,000 cannot be continually paid to him as we would be departing from the Terms of Reference.

CONCLUSION

Dispute No. 1:

This dispute is set aside.

Dispute No. 2:

The increment due for the year 2009 to be paid to Disputant.

Dispute No. 3:

This dispute is set aside.

The Tribunal awards accordingly.

**(Sd)Rashid Hossen
(President)**

**(Sd)Christian Bellouard
(Member)**

**(Sd)Philippe Edward Blackburn
(Member)**

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

Date: 7 November 2012