EMPLOYMENT RELATIONS TRIBUNAL
AWARD

RN 19/13

Before

Indiren Sivaramen	**Vice-President**
Ramprakash Ramkissen	**Member**
Desire Yves Albert Luckey	**Member**
Georges Karl Louis	**Member**

In the matter of:-

Dr Krishna Kumar Jha (Disputant)

And

Mahatma Gandhi Institute (Respondent)

The present matter has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(7) of the Employment Relations Act (hereinafter referred to as "the Act"). The two parties have not been able to reach an agreement and the Tribunal thus proceeded to hear the matter. Both parties were assisted by Counsel. The terms of reference read as follows:

"Whether, I, Dr Krishna Kumar Jha, who previously held the post of Educator at Prof. B. Bissoondoyal College (P.S.S.A) be allowed to retain the salary of Educator upon my appointment as Lecturer at the Mahatma Gandhi Institute, as is the case for Educators from State Secondary Schools and Parastatal Bodies joining the MGI as Lecturer."

The Disputant deponed before the Tribunal and he solemnly affirmed to the correctness of the contents of his Statement of Case. He did not agree that because he was not in the service of the Government of Mauritius, a local authority or a statutory body he could not benefit from the privilege that his colleagues coming from those institutions were benefiting. He also stated that there was a change in the reason put forward to justify the decision taken, that is, from budgetary constraint to him not coming from the institutions mentioned above. He averred that he was on a pensionable scheme just like in the Civil Service and was contributing at the State Insurance Company of Mauritius Ltd (SICOM). In cross-examination, the disputant agreed that he was not employed by the Private Secondary Schools Authority (P.S.S.A) but averred that he was benefitting from the same conditions of service as for employees of State Secondary Schools.

No evidence was adduced on behalf of the Respondent.

Counsel for the Disputant submitted that one cannot discriminate between class of institutions when Educators whether coming from Government sponsored institutions or from private institutions (State sponsored through the P.S.S.A) are doing the same work. He also referred to Sections 9, 10(d) and 11 of the Equal Opportunities Act. He stressed on the fact that the reason given previously by management for the different treatment of Disputant was because of budgetary implication whereas this has not been relied upon at all before the Tribunal.

Counsel for Respondent submitted that the Disputant has failed to adduce evidence that Educators from State Secondary Schools and Parastatal Bodies retained their salary of Educator (when higher than starting salary for Lecturer) upon their appointment as Lecturer at the Respondent. Counsel then referred extensively to the Statutory Bodies Pension Funds Act more particularly at sections 7 (Pensionable service) and 13A (Past Service) and observed that the Professor Basdeo Bissoondoyal College (as opposed to the P.S.S.A) was not on the list of statutory bodies governed by the said Act. Counsel also referred to the *JurisClasseur, Travail, Fascicule Rémunération* and more particularly under the heading "*Respect du principe "égalitaire*" ("à travail égal, salaire égal"). Counsel suggested that persons who were in the employment of the Government of Mauritius or a local authority/statutory body need to have their pension rights preserved on joining the Respondent. This allows the employer to make an "intelligible differentia" and treat those persons accordingly so as to preserve their pension rights. This right is not open to persons joining the Respondent from the private sector.

In re-examination, Counsel for Disputant argued that one should not refer to French doctrine when our law is clear. He also added that nobody has clarified the budgetary constraint issue.

The Tribunal has examined the evidence on record and the submissions of both Counsel. The Disputant has deponed under solemn affirmation to the correctness of the contents of his Statement of Case and it is referred therein that unlike Educators who came from State Secondary Schools and Parastatal Bodies, Disputant was not allowed to retain the former salary he was drawing as Educator when he joined Respondent as Lecturer. This has not been denied and we take it that Educators from State Secondary Schools and Parastatal Bodies were indeed allowed to retain their former salary (obviously where applicable) on joining the Respondent. This is in fact in line with the own submissions of Counsel for Respondent in relation to pension rights. The issue is whether the Disputant should also be allowed to retain his salary of Educator upon his appointment as Lecturer at the Respondent.

Counsel for Disputant has referred to the term "discriminate" and to a few provisions in the Equal Opportunities Act in his submissions. It is apposite to note that "discriminate" has been defined in section 2 of the Equal Opportunities Act and reads as follows:

"discriminate" means –
(a) discriminate directly on the ground of status, as provided under section 5;
(b) discriminate indirectly on the ground of status, as provided under section 6;
or
(c) discriminate by victimisation, as provided under section 7

We are not in the realm of discrimination by victimisation as contemplated by section 7 of the Equal Opportunities Act. Section 5 of the Equal Opportunities Act provides as follows:

5. Direct discrimination
(1) A person ("the discriminator") discriminates directly against another person ("the aggrieved person") on the ground of the status of the aggrieved person where –
(a) in the same or similar circumstances, the discriminator treats or proposes to treat the aggrieved person less favourably than he treats or would treat a person of a different status; and
(b) the discriminator does so by reason of –
(i) the status of the aggrieved person; or
(ii) a characteristic that generally appertains or is imputed to persons of the status of the aggrieved person.
(2) In determining whether the discriminator directly discriminates, it is irrelevant –
(a) whether or not he is aware of the discrimination or considers the treatment less favourable;
(b) whether or not the status of the aggrieved person is the only or dominant reason for the discrimination, as long as it is a substantial reason.

Thus, the "status" of the aggrieved person must be a substantial reason for the discrimination. "Status" is itself defined in the same Act and reads as follows:

"status" means age, caste, colour, creed, ethnic origin, impairment, marital status, place of origin, political opinion, race, sex or sexual orientation

Section 6 of the Equal Opportunities Act also refers to an aggrieved party being discriminated indirectly on the ground of "status". The Disputant in the present dispute is not averring that he has been discriminated on the ground of age, caste, colour and so on and the Tribunal thus has no difficulty in finding that there cannot be discrimination under the Equal Opportunities Act.

Bearing in mind the principles to be applied by the Tribunal under section 97 of the Employment Relations Act, guidance may also be sought from sections 4 and 20(1) of the Employment Rights Act. They provide as follows:

4. Discrimination in employment and occupation
(1) (a) No worker shall be treated in a discriminatory manner by his employer in his employment or occupation.
(b) No person shall be treated in a discriminatory manner by a prospective employer in respect of access to employment or occupation.

(2) Any distinction, exclusion or preference in respect of a particular occupation based on the inherent requirements thereof shall not be deemed to be discrimination.

(3) A person does not discriminate against another person by imposing, proposing to impose, on that person, a condition, requirement or practice that has, or is likely to have, a disadvantaging effect, where the condition, requirement or practice is reasonable in the circumstances.

(4) The matters to be taken into account in determining whether or not a condition, requirement or practice is reasonable in the circumstances include –

(a) the nature and extent of the disadvantage resulting or likely to result, from the imposition or proposed imposition of the condition, requirement or practice;

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is proportionate to the result sought to be achieved by the person who imposes, or proposes to impose the condition, requirement or practice.

(5) For the purpose of this section –

(a) "discrimination" includes affording different treatment to different workers attributable wholly or mainly to their respective descriptions by age, race, colour, caste, creed, sex, sexual orientation, HIV status, religion, political opinion, place of origin, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

…

20. Equal remuneration for work of equal value

(1) Every employer shall ensure that the remuneration of any worker shall not be less favourable than that of another worker performing the same type of work.

In the case of **Chemical Manufacturing and Connected Trades Employees Union and Compagnie Mauricienne de Commerce Ltée, RN 54/12**, the Tribunal referred to sections 3 and 16 of the Constitution and stated the following:

In relation to the principle of equality and protection from discrimination under sections 3 and 16 of the Constitution, their Lordships of the Judicial Committee of the Privy Council in the case of ***Matadeen and Anor v Pointu and Ors (Privy Council) 1997 PRV 14*** *(referred to in the Supreme Court case of* ***Thandrayen & Anor v. The State of Mauritius & 2 others, 2010 SCJ 358****) concluded as follows: "is that sections 3 and 16, even if construed with section 1, do not apply to inequalities of treatment on grounds falling outside those enumerated. Such inequalities are not subject to constitutional review. The question of whether they are justifiable is one which the Constitution has entrusted to Parliament or, subject to the usual principles of judicial review, to the Minister or other public body upon whom Parliament has conferred decision-making authority."*

Thus, even under section 4 of the Employment Rights Act, there would be no discrimination in the present dispute since any different treatment is not attributable wholly or mainly to description by age, race, colour and so on.

The Tribunal will now refer to the principle of equal remuneration for work of equal value as contemplated under our law. "Remuneration" is defined in wide terms at section 2 of the Employment Rights Act. In the light of the un-rebutted averments in the Statement of Case of the Disputant (more particularly at paragraph 1(b)) which have been maintained by Disputant under solemn affirmation, there is evidence that there are Lecturers (coming from State Secondary Schools and secondary schools of the Respondent) at the Respondent who retained their higher salaries as opposed to joining at the entry point in the salary scale for Lecturer at the Respondent. There is no evidence or any reason to suggest that those Lecturers would be performing a different type of work than Disputant.

In the case of **Chemical Manufacturing and Connected Trades Employees Union and Compagnie Mauricienne de Commerce Ltée (above),** the Tribunal had also the opportunity to examine the principle of equal remuneration for work of equal value and the Tribunal stated the following:

*In Constitutional law, the principle of equality is not absolute but subject to limitations. In the case of **Police v Rose 1976 MR 79**, the Supreme Court observed that "Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently." Their Lordships in the case of **Matadeen and Anor v Pointu and Ors (Privy Council) 1997 PRV 14** cited with approval the above and referred to same as one of the building blocks of democracy. The Tribunal thus finds that similarly section 20 of the Employment Rights Act does not create an absolute right for equal remuneration but must be read as being subject to there being a valid reason for two workers to be treated differently.*

This is in line with French and English case law. Under French law, the Court ("Cour de Cassation") has accepted a number of circumstances which could justify the non-application of the principle of "à travail égal salaire égal". These would include for instance "la décision justifiée par "des considérations liées à l'intérêt de l'entreprise" (Corrignan-Carsin Danielle, "Un nouvel embauché n'est pas fondé à invoquer une violation du principe "à travail égal, salaire égal", des "raisons objectives" justifiant la différence de rémunération", JCP 2006, éd. G, n° 5, II, 10017), « une différence pour éviter la fermeture d'un établissement » (Soc., 21 juin 2005, n° 02-42.658, Bull. 2005, V, n° 206) and personal qualities ('the personal equation') of the workers concerned such as « l'expérience professionnelle acquise » (Soc., 29 septembre 2004, n° 03-42.033,Soc ; 15 novembre 2006, n° 04-47.156, Bull. 2006, V, n° 340 ; Soc., 19 décembre 2007, n° 06-44.795) or « une différence de compétence reconnue de manière transparente » (Soc., 17 octobre 2006, n° 05-40.393). The circumstances will be analysed "in concreto" by the Court to decide upon the relevance of the reason/s given. In his report to L'Arrêt n° 574 du 27 février 2009 - Cour de cassation - Assemblée plénière, Mr Mas, « conseiller rapporteur » wrote :

« Au fil du temps la Cour [meaning « la Cour de Cassation »] a même augmenté ses exigences, puisqu'elle a dans un premier temps exigé des justifications objectives,

puis des justifications objectives et pertinentes et enfin que ces justifications soient appréciées "in concreto" par le juge, qui doit en contrôler concrètement la pertinence. »

Under English law, the principle is found in the Equal Pay Act and Sex Discrimination Act. We need not go in detail in the relevant provisions but suffice it to say that variation in treatment in the sphere of employment must be genuinely due to a material difference between each relevant worker's case. In ***Rainey v Greater Glasgow Health Board [1987] IRLR26 HL****, the House of Lords ruled that an employer has to show "objectively justified grounds" for the difference in pay.*

Such an interpretation is in line with the extracts referred to by Counsel for Respondent in *JurisClasseur, Travail, Fascicule Rémunération* under the heading "*Respect du principe "égalitaire*" ("à travail égal, salaire égal"). This interpretation will also be in line with section 4(3) of the Employment Rights Act. Section 4(3) of the said Act is a proviso to the general principle that no worker shall be treated in a discriminatory manner by his employer in his employment and provides that there is no discrimination where a condition, requirement or practice that has or is likely to have a disadvantaging effect is imposed on a person where same is reasonable in the circumstances. The Tribunal thus has to ascertain how far the reason put forward for the difference in treatment is relevant, valid and reasonable in the circumstances.

Reference has been made in Respondent's Statement of Case to the adjustment of salaries of officers joining the Respondent from the Government of Mauritius, local authorities or other statutory bodies in order to preserve the pension rights of the incumbents. The Respondent is a statutory body as defined at section 2 of the Statutory Bodies Pension Funds Act by being a body specified in the First Schedule of that Act. Though the P.S.S.A will also be a statutory body as defined in the Statutory Bodies Pension Funds Act, Professor Basdeo Bissoondoyal College is not on the list of statutory bodies mentioned in the First Schedule to the Statutory Bodies Pension Funds Act. "Statutory body" is defined in the Statutory Bodies Pension Funds Act as a body specified in the First Schedule and includes, for the purposes of the Scheme (the Public Pensions Defined Contribution Pension Scheme), a secondary school as defined in the Private Secondary Schools Authority Act. It is apposite to note that reference to "secondary school" and the "Scheme" was included by an amendment to the law by Act 26 of 2012, that is, well after the appointment of Disputant as Lecturer in 2009. In any event, Professor Basdeo Bissoondoyal College is not a statutory body except for the limited purpose of the new Public Pensions Defined Contribution Pension Scheme (which is irrelevant in the present matter). Section 7(1) of the Statutory Bodies Pension Funds Act provides as follows:

7. Pensionable service

(1) Subject to subsections (2) and (3)[irrelevant for our purposes] *, service shall be reckoned as pensionable service for the period commencing from the date an officer begins to draw salary from the statutory body to the date he leaves the statutory body, and in respect of which contributions were payable to the Fund or the individual account, as the*

case may be, and shall include past service which conforms to the conditions specified in section 13A.

Section 13A of the Statutory Bodies Pension Funds Act provides as follows:

13A. Past service

In computing the length of service of an officer for the purpose of determining the amount of pension benefits payable, his past service, whether under one or more contract of service and whether with one or more employer, that employer being the Government of Mauritius, a local authority and a statutory body shall be added where –

(a) his past service was not terminated for misconduct of any kind;

(b) he is not drawing a pension in respect of his past service;

(c) he has not been paid any severance allowance or compensation in respect of his past service; and

(d) not more than 7 years have elapsed between the different periods of service in respect of which his pension is to be calculated.

Thus, for past service to be relevant for the purposes of determining the amount of pension benefits under the above Act, the employer must have been the Government of Mauritius, a local authority or a statutory body. Under section 14 of the same Act, provision is made for the transfer (subject to section 13A above) of accrued pension rights to the appropriate Pension Fund of the statutory body for an officer who was in the service of the Government of Mauritius and who joins a statutory body. There is no such provision for someone who was employed in a private secondary school and who joins a statutory body or the public service.

The P.S.S.A Act provides at section 5(1)(a) that the Authority shall advise or assist in the setting up of pension schemes for the staff of secondary or pre-vocational schools (not owned and managed by Government). The 2008 PRB Report provides that employees of the private secondary schools are generally governed by the Private Secondary School Staff Pension Scheme. The PRB in its various reports (starting with the recommendations of the 1987 PRB Report) has embarked in a process to make the salaries and conditions of service of employees of the private secondary schools and those of the State Secondary Schools uniform. This is in line with the vision of having a homogeneous secondary education which is dispensed in a uniform manner. However, the teaching personnel of private secondary schools are still referred to as Educators (Private Secondary Schools) whereas for State Secondary Schools, reference is made to Educators (Secondary). More importantly however, Educators (Secondary) are public officers who are in the service whereas Educators (Private Secondary Schools) are not employed by the Government of Mauritius, a local authority or other statutory body but by the relevant secondary schools (as is clear from section 16(4) of the P.S.S.A Act and settled case law on

this issue such as the Supreme Court case of **Federation of Union of Managers of Private Secondary Schools & Anor. and the P.S.S.A & Anor 1996 SCJ 204B**).

The Tribunal thus finds nothing wrong for the Respondent to treat the Disputant as a new entrant. His salary was, according to Respondent's Statement of Case, adjusted for incremental credits for qualifications higher than those prescribed in the scheme of service. Reference is also made in the 2008 PRB Report (Volume 1 at Chapter 18.9) to the following:

18.9.11 We recommend that officers who move to the Civil Service be eligible to the grant of one incremental credit, up to a maximum of three, for each year of experience acquired in a similar capacity in a Local Authority or Parastatal Body and Other Statutory Body reported upon by the PRB. This recommendation should <u>also</u> [underlining is ours] *apply to employees of the Private Secondary Schools, covered by the PRB, and joining the Civil Service. However, the incremental credits due under this recommendation would be payable on confirmation.*

18.9.12 We also recommend that the provisions under paragraph 18.9.11 be extended to officers of a Local Authority, a Parastatal Body and Other Statutory Body reported upon by the PRB and the Private Secondary Schools covered by the PRB who move from one institution to another.

Similar provisions are again provided for under the 2013 PRB Report. Thus, provision is made for further adjustment of salary even for someone coming from a private secondary school (covered by the PRB) but the latter must have acquired experience in a similar capacity (i.e in the capacity of Lecturer and not Educator in our case). Apart from incremental credits for higher qualifications, there is thus no evidence on record of any special need for Disputant to enter at a higher entry point in the salary scale for Lecturer. Indeed, in scarcity areas, the employer would have been able to have recourse to a number of strategies to attract and retain employees including to make use, subject to relevant clearance having been obtained, of higher entry point in the salary scale. We do not have such evidence on record.

For all the reasons given above, the Tribunal cannot award that the Disputant should be allowed to retain his salary of Educator upon his appointment as Lecturer at the Respondent as is the case for Educators from State Secondary Schools and Parastatal Bodies. The dispute is thus set aside.

(Sd) Indiren Sivaramen
Vice-President

(Sd) Ramprakash Ramkissen
Member

(Sd) Desire Yves Albert Luckey
Member

(Sd) Georges Karl Louis
Member **7 June 2013**