

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 38/16

Before

Indiren Sivaramen	Vice-President
Soonarain Ramana	Member
Rajesvari Narasingam Ramdoo	Member
Khalad Oochotoya	Member

In the matter of:-

Mr Deomaneesingh Ramlagun (Disputant)

And

Bank of Baroda (Respondent)

The above case has been referred to the Tribunal for arbitration in terms of Section 69(7) of the Employment Relations Act 2008 (the "Act"). The terms of reference read as follows:

1. *"Whether I shall retire on the last date of the month in which I complete 65 years of age which is on the 31st May 2017 in accordance with the Internal Bank Policy governing the terms & conditions of work between the employer and the employee at the Bank of Baroda (Clause 17 Personal Policy under subtitle Superannuation.)"*
2. *"Whether I shall be paid the salary of a Senior Manager at the Bank of Baroda which falls in salary scale 3 along with all other associated benefits in relation to the said post as from January 2016 until my retirement age after the completion of 65 years of age on 31st May 2017."*

Both parties were assisted by counsel. The Tribunal has already delivered a ruling in the present matter after hearing arguments from both counsel on preliminary objections

taken on behalf of the Respondent. The Tribunal ruled that the preliminary objections were at best premature and the objections were set aside. The Tribunal thus proceeded with the hearing of the matter.

A copy of a letter dated 16 March 2016 issued by the Ministry of Labour, Industrial Relations, Employment and Training in relation to the interpretation of section 49(1) of the Employment Rights Act was produced (Doc A). The Disputant then deposed before the Tribunal and he solemnly affirmed to the correctness of the contents of his Statement of Case. He stated that he was promoted as Manager Cadre on 8 April 2004 and he produced a copy of a document to that effect (Doc B). He was then promoted Senior Manager. He referred to clause 17 of the "Personnel Policy" of the Respondent (Annex C to the Statement of Defence of Respondent). He was requested to write a letter in relation to the effective date for his retirement and he sought legal opinion on the issue. Nevertheless, he received a letter from Respondent informing him that he would have to retire on 31 March 2016. He had no choice but to retire since he was informed that replacement was being sent to his branch. He did not receive any increase in salary following his promotion to Senior Manager. He stated that the letter sent to him (copy is Annex F to Statement of Defence of Respondent) is binding on the bank and that he had to be on probation for a period of six months. He stated that the Respondent had misinterpreted clause 17 of the "Personnel Policy" by telling him that he would superannuate from bank services on 31 March 2016 and that he was seeking a clarification from the Tribunal. Later, he stated that he wanted the Tribunal to give a determination in the light of the facts of the case.

In cross-examination, he stated that the Respondent had informed him that as per the law he has retired. He wants an interpretation of the Tribunal on clause 17 in the "Personnel Policy" of Respondent and on the position of Respondent, that is, whether the Respondent was right or wrong to ask him to retire. He averred that he has suffered prejudice and that he is seeking for his reinstatement. He wants to continue in the service as according to him he has never retired. He stated that clause 17 in the "Personnel Policy" of Respondent was amended as per Annex I to the Statement of Defence of Respondent but that this was after Respondent's letter of 28 March 2016 informing him that he will superannuate from bank services on 31 March 2016. He agreed that the date of retirement is not an eligible factor to be considered for promotion. He is aware that there are negotiations for salary review every three years and that the union was discussing with management on salary review. He conceded that the Respondent has always stated that any difference in salary would be paid to him once the issue concerning salary had been resolved. He averred that he was on salary scale 3 and wanted to be paid as such.

Ms Merchant, an expatriate and Senior Manager at Respondent then deposed on behalf of the Respondent and she solemnly affirmed to the correctness of the contents of Respondent's Statement of Defence including the annexes. She stated that by clause 17 in the "Personnel Policy" of Respondent, the Respondent meant that superannuation would be in accordance with prevailing local law. The Respondent follows the local law in relation to this issue. Ms Merchant stated that clause 17 was amended eventually as

the bank felt that all the employees were not interpreting the clause properly. She however averred that there was no change in what the clause expressed. She stated that Disputant was promoted to Senior Manager cadre and was placed on a probation period of six months as the probationary period for the Senior Manager cadre is six months. She stated that the Disputant will be paid the revised salary for Senior Manager retrospectively as from January 2016 to March 2016 as soon as negotiations on the revised salary are over. According to Ms Merchant, the post of Senior Manager for local staff was a new post. She also stated that Disputant has already been superannuated according to the local law and that his post has been filled.

In cross-examination, Ms Merchant stated that there are two categories of Senior Manager, one for local staff and one for expatriates. She stated that the job roles for the two categories of Senior Manager were different. She stated that though the labelling of 'Senior Manager' is the same for both categories "*but the role that we have to lead as expats, the job role given us also are entirely different from the job role of a Senior Manager in the local cadre.*" She added that the Respondent was at all times aware of the retirement of Disputant. She stated that though Disputant was to retire, he was duly promoted to the Senior Manager cadre because he was eligible for the post and Respondent did not want to discriminate against him. Ms Merchant added that Disputant could not be confirmed immediately. He stated that the letter of promotion issued to Disputant was a standard letter and could not be interpreted as meaning that the bank believed that Disputant would work until he reaches 65. She had no difficulty with Doc A and stated that it is at the discretion of Management to request a worker to work after his retirement age. In the present matter, the Respondent has simply not opted for the continuation of the contract. She confirmed that there was no dispute concerning the salary and that the Respondent was ready to pay the Disputant the salary agreed between management and the union.

The Tribunal has examined all the evidence on record including documents produced and the submissions of both counsel. Counsel for Respondent has stressed that the preliminary objections raised on behalf of Respondent had not been permanently set aside and were found to be premature. He renewed his submissions on the preliminary objections and added that the issue involved deciding whether the Disputant was a worker within the definition of "worker" under the Employment Rights Act (and not only the Employment Relations Act). He suggested that this would be within the exclusive confines of the Industrial Court since it arose out of the Employment Rights Act. Counsel for Respondent referred to section 71 of the Employment Relations Act. He also submitted that Disputant was seeking for reinstatement which would be outside the ambit of the terms of reference. Alternatively, if reinstatement was not being sought, Counsel argued that an award of a declaratory nature was thus being sought from the Tribunal.

It is now not disputed that the Disputant retired on 31 March 2016 and that a sum of some Rs 3.9 million was credited to his bank account. Disputant has however stated that he wants to continue in the service and is seeking for his reinstatement. He copied the letter he sent to the Commission for Conciliation and Mediation to the bank

informing them that he was not agreeable that his account had been credited without his knowledge. From the terms of reference before us, there is nothing to suggest that Disputant is seeking his reinstatement and more importantly the Tribunal would be acting *ultra petita* if it was to award (if at all possible) that Disputant should be reinstated. With the terms of reference as drafted under limb 1 of the dispute, the Disputant is clearly seeking an award of a declaratory nature. Also, this declaratory award is being sought when Disputant has already retired (rightly or wrongly) on 31 March 2016. We will repeat what we have already stated in our earlier ruling: the Tribunal does not generally give declaratory awards (**vide Mr Ugadiran Mooneeapen and Mauritius Institute of Training and Development (above); Mr Abdool Rashid Johar and Cargo Handling Corporation Ltd ERT/RN 93/12 and Mr Yousouf Ibne Abdulla Cheddy and Ministry of Labour, Industrial Relations, Employment & Training, ERT/RN 120/15**). In the present case, not only a mere declaration “after the event” is being sought from the Tribunal but, more importantly, the dispute under limb 1 falls squarely within the exclusive jurisdiction of the Industrial Court.

Indeed, the present dispute pertains to the interpretation of “retirement age” under section 2 of the Employment Rights Act, the term “worker” as used in the definition of “retirement age” under the same legislation and section 49 of the Employment Rights Act. From the evidence adduced, it is also clear that the Disputant wants a ‘clarification’ from or ‘interpretation’ of the Tribunal as to whether the Respondent was right or wrong to ask him to retire. Retirement or asking a worker to superannuate is one form of termination of a contract of employment. “Termination of Agreement” falls under Part VIII of the Employment Rights Act. Section 46(5)(e) of the Employment Rights Act provides as follows:

“(5) Where a worker has been in continuous employment for a period of not less than 12 months with an employer, the Court may, where it finds that –

(a) ...

(e) notwithstanding paragraphs (a), (b), (c) and (d), the termination of agreement of the worker was unjustified,

order that the worker be paid severance allowance as follows –

(i) for every period of 12 months of continuous employment, a sum equivalent to 3 months remuneration; and

(ii) for any additional period of less than 12 months, a sum equal to one twelfth of the sum calculated under subparagraph (i) multiplied by the number of months during which the worker has been in continuous employment of the employer.

The Disputant with the present dispute is in fact seeking ‘clarification’ from the Tribunal as to whether his retirement (termination of his contract of employment) was justified or not.

Section 3 of the Industrial Court Act provides as follows:

“There shall be an Industrial Court with exclusive civil and criminal jurisdiction to try any matter arising out of the enactments set out in the First Schedule or of any regulations made under those enactments and with such other jurisdiction as may be conferred upon it by any other enactment.”

The First Schedule to the Industrial Court Act (as amended) includes the ‘Employment Rights Act’. The Industrial Court thus shall have exclusive jurisdiction to try any matter arising out of the Employment Rights Act. This is subject to section 46(5A) of the Employment Rights Act which provides that where a matter has been referred to the Tribunal under section 39B (Reduction of workforce), the Industrial Court shall have no jurisdiction to hear the matter.

Section 71 of the Employment Relations Act provides as follows:

71. Exclusion of jurisdiction of Tribunal

The Tribunal shall not enquire into any labour dispute where the dispute relates to any issue-

(a) within the exclusive jurisdiction of the Industrial Court;

(b) which is the subject of pending proceedings before the Commission or any court of law.

Thus, besides a purely declaratory award which is being sought, the dispute is not within the jurisdiction of the Tribunal as it involves a dispute which relates to an issue which is within the exclusive jurisdiction of the Industrial Court. For the reasons given above, the Tribunal sets aside the dispute under limb 1.

As regards the dispute under limb 2, Ms Merchant has stated that the salary of Senior Manager will be paid to Disputant with retrospective effect. Counsel for Disputant did not dwell further on the issue of salary in the light of the evidence of Ms Merchant. He stated in his submissions: *“Well, as far as the salary’s is concerned, I will not dwell any further. It is agreed now, that there is negotiations ongoing for Mauritian staff as opposed to Indian staff. I won’t dwell further in that.”* The evidence of Ms Merchant on the dispute under limb 2 has not been challenged. She stated that the job roles for local staff and ‘expatriate’ Senior Managers are different. This has not been disputed. Ms Merchant also explained that the figure in U.S dollars mentioned by Disputant is the salary for ‘expatriate’ Senior Managers. In the light of the evidence adduced, the Tribunal will thus proceed on the basis that the job roles for local staff Senior Managers are different from the job roles of ‘expatriate’ Senior Managers at Respondent.

Disputant conceded that the union and Management were discussing about the salary revision. Annex M to the Statement of Defence of Respondent tends to support the version of Ms Merchant as to ongoing negotiations with the union for the introduction of a new salary scale for the post of Senior Manager for Local Staff which is referred to as a post which was recently introduced. In the light of the evidence adduced before it, the

Tribunal cannot find that Disputant should be paid in salary scale 3. Apart from one figure mentioned in U.S dollars, evidence of the salary scale has not been produced and the Tribunal is in the dark as to whether the amount mentioned is a basic salary or remuneration offered to Senior Managers who are expatriates. Also, in the light of the reasons given under limb 1 of the dispute, the Tribunal cannot make any award in relation to the last part of the terms of reference, that is, “*until my retirement age after the completion of 65 years of age on 31st May 2017.*” It is not challenged by Respondent that Disputant should be paid the salary of a Senior Manager as from January 2016 and Respondent has undertaken to do the needful as soon as negotiations with the union are over.

The Tribunal only wishes to highlight what appears to be a flaw in Respondent’s case. Indeed, whilst the letter dated 5 January 2016 (Annex F to the Statement of Defence of Respondent) addressed to “Mr Raj Ramlagan” refers to the promotion granted to the latter and to the probationary period applicable, the letter does not refer at all to the corresponding salary. Respondent should have first identified the relevant salary scale (even if same would have been subject to any revision afterwards) before any incumbent was appointed to that allegedly newly introduced post.

The Tribunal records the undertaking given on behalf of Respondent that Disputant will be paid any salary due following his promotion to the Senior Manager cadre in January 2016. For all the reasons given above and in the light of the manner in which the terms of reference for the dispute under limb 2 have been drafted, the dispute under limb 2 is also set aside.

Sd Indiren Sivaramen
Vice-President

Sd Soonarain Ramana
Member

Sd Rajesvari Narasingam Ramdoo
Member

Sd Khalad Oochotoya
Member

19 August 2016