

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 06/2017

AWARD

Before:

Shameer Janhangeer	Vice-President
Esther Hanoomanjee (Mrs)	Member
Rabin Gungoo	Member
Renganaden Veeramootoo	Member

In the matter of: -

Prisons Officers Association

DISPUTANT

and

**State of Mauritius as represented by
Mauritius Prisons Service**

RESPONDENT

The present matter has been referred to the Tribunal for arbitration by the *Commission for Conciliation and Mediation* pursuant to *section 70 (3)* of the *Employment Relations Act*. The terms of reference of the dispute reads as follows:

Whether constraining prisons officers irrespective of ranks to work only 40 hours per month on 'Bank Scheme' is in breach of the terms and conditions of these officers as laid down at paragraph 13.49 and under recommendation 6 at paragraph 13.50 of the Pay Research Bureau 2003.

The Disputant was assisted by its Trade Union Representative Mr Narendranath Gopee. The Respondent was assisted by State Counsel instructed by State Attorney. Both parties have submitted their respective Statement of Case in the present matter.

THE DISPUTANT'S STATEMENT OF CASE

The Disputant Association has averred that it is duly recognised as a bargaining agent by the Respondent for employees serving under the Mauritius Prisons Service. The *Pay Research Bureau ("PRB") Report 2003* at *paragraphs 13.49* and *13.50* recommended the creation of a Bank of Prisons Officers, comprising of off-duty, on leave or retired Prison Officers, to meet exigencies in case of crisis and emergency. Such officer would be paid an allowance of Rs 300 for every 3 hours when called to attend duty.

The *PRB* in its 2008 Report, at *paragraph 14.4.57* and recommendation 16, maintained the Bank of Prisons Officers Scheme (the "Scheme") and revised the allowance to Rs 360. The *PRB Report 2013* also maintained same and reviewed the condition of payment of the allowance at *paragraph 15.4.18*; the quantum of the allowance was revised to Rs 450. The *PRB Report 2016* only revised the allowance of the Scheme to Rs 640.

The Disputant avers that the *PRB* since the inception of the Scheme and in its subsequent Reports did not attach any other supplementary condition of restrictive nature to modify the initial condition attached to the payment of the allowance under the Scheme. The *PRB* is the authorised body to determine the terms and conditions of service of Public Officers and therefore of Prisons Officers. Once the Option Form is signed all signatories are bound by the terms and conditions of service.

The Disputant has averred that the Respondent, by way of the *Commissioner of Prisons Circular 14 of 2015* dated 12 June 2015, unilaterally modified the condition attached to the Bank Scheme by restricting the number of hours of duty under the Scheme to 40 hours per month. This restriction breaches the terms and conditions of service of Officers under the Bank Scheme as prescribed by the *PRB* in its Reports since 2003.

The Disputant believes that the imposed restriction is irrational and unreasonable and prays that the Tribunal declares same null and void so as to undo the infringement to the terms and conditions of service.

THE RESPONDENT'S STATEMENT OF REPLY

The Respondent has admitted to the recommendations of the *PRB* in its Reports as averred by the Disputant. It has averred that the number of hours' work to be performed under the Scheme pertains to the implementation of the relevant recommendations of the *PRB Reports* which rests primarily with the Respondent, who may consult with the Ministry of Civil Service and Administrative Reforms – *paragraphs 21.35 and 21.36 of the PRB Report 2016 Volume 1* refers. The *PRB* recommendation should not be construed as providing for an unlimited number of hours' work under the Scheme, the more so having recourse to the Officers forming part of the Bank is conditional upon emergency situations arising.

The Respondent denies that it has unilaterally modified the conditions attached to the Bank Scheme by restricting the number of hours of duty to 40 per month under the Scheme. It avers that the Scheme was introduced to help the Prisons Department to effectively face crisis or emergency situations; it has been noted that there was an abuse of the Scheme with some Officers performing more than 100 Bank hours monthly; the Internal Control Report highlighted that Rs 27.9 million and Rs 41.5 million were disbursed for payment under the Scheme for the years 2013 and 2014 respectively; the *Commissioner of Prisons Circular* dated 12 June 2015 was issued with a view to ensure a proper monitoring of the Scheme and controlling any abuse thereof. The said *Circular* also apprised the main observations of the Internal Control Report.

The Respondent denies that restriction of the number of hours breaches the terms and conditions of service of Officers working under the Bank Scheme as made by the *PRB* in so far as it pertains to the implementation of the relevant recommendations of the *PRB Reports*, which rests primarily with the Respondent.

The Respondent has also averred that the *Commissioner of Prisons*, as Accounting Officer, is responsible for the control of the budget allocated to the Mauritian Prisons Service and therefore responsible to ensure a judicious use of "Bank Allowances". The *Commissioner of Prisons* is therefore entitled to exercise a control over the number of hours' work performed under the Scheme and hence determine the required number of hours to be performed under the Scheme in case of emergency and in the best interests of the Mauritius Prison Service.

THE EVIDENCE OF WITNESSES

Mr Hanson Heeranath Mungrah, Secretary of the Prisons Officers Association, was called to depose on behalf of the Disputant. Mr Mungrah stated that the *PRB* in its 4 Reports recommended the Bank Scheme where there is crisis management or an emergency to palliate for shortage of staff. The Mauritius Prisons Service is suffering from lack of staff. They have drawn the attention of the Commissioner of Prisons that Officers are not having proper relief, Officers are being retained on post from 5 or 6 consecutive years. The Commissioner issued a Circular letter mentioning that every Officer should perform on 40 hours per Bank per month. He finds this in controversy with the *PRB*.

Mr Mungrah went on to state that that Officers attached to the Bank of Prisons Officers are supposed to work as normal Officers, escorting detainees to public hospitals and the public and private places. In emergency cases, they intervene, look for the movement of detainees, lock and unlock detainees and serve meals. When there is a lack of staff, there is a danger to security so that Officers on leave have to be retained to call them to assist in the service. With shortage of staff, a high profile escort is being done with 2 or 3 Officers instead of 6 Prisons Officers. They have drawn the attention of the Commissioner of Prisons that standing orders are not being respected. They are actually having a crisis management. They have coped as a responsible union. They are having many difficulties for their Officers to perform their duties. They are afraid that if they do not have any reserve force of Officers in hand when the crisis situation arises, they may find themselves in a very big problem one day.

Upon questions from Counsel for the Respondent, Mr Mungrah notably stated the only condition laid down in *paragraph 13.50* (of the *PRB Report 2003*) for Bank is the requirement of crisis and emergency; there is no number of hours set out in there. The *PRB* has not fixed any number of hours. It is the Respondent who decides to call upon an Officer. It is the Supervising Officer who decides to call when he finds additional Officers must be called to meet the number of staff. The implementation of the recommendation of the *PRB* rests with the employer. The Bank hours do not form part of the normal basic of 40 hours and are over and above. It is overtime, it is over and above the normal 40 hours. Mr Mungrah read from *paragraph 18.5.57* of the *PRB Report 2016*, General Principles governing overtime. He agreed that there should be a control over Bank hours and it has to be kept to a minimum. There is no

recommendation in the *PRB Report 2016* about the 40 hours' limitation. Judicious use must be made of financial resources. He is not disputing the observation of Internal Control in the Circular.

Mr Vikesh Kumar Bheekharry, HR Management Officer at the Mauritius Prisons Services, was called on behalf of the Respondent. He swore as to the correctness of the contents of the Respondent's Statement of Reply. He explained that crisis and emergency in the Prisons Service is mostly when detainees are posted to hospitals as in such cases more staff have to be deployed as they have to cater for 24 hours' security to the detainees admitted to hospital; and also in terms of emergency, it can be relief and shortage of staff at the institution. Bank hours are beyond normal working hours. There is a difference in the payment system to overtime work as the *PRB* has prescribed the rate for Bank hours and there is a formula devised by the *PRB* for extra hours. There were cases where an Officer performed 160 hours. Extra hours were being computed as Bank and was a misinterpretation of the (Internal Control) Report. As from 15 June 2015, Bank is being limited to 40 hours. There is no modification in the implementation of the *PRB* regarding the Bank. The Respondent has the right to fix the number of hours being performed.

Mrs Satama Millien, Acting Manager HR at the Ministry of Civil Service and Administrative Reforms was also called on behalf of the Respondent. She notably stated that it is the prerogative of management to pick the number of hours under the Bank Scheme. Management does not have to seek advice from the Ministry of Civil Service. There was advice sought on the mode of payment for Bank and extra hours. Bank and extra hours is not the same. Extra hours are overtime payment with different recommendations. There was a problem of implementation as they were paying Bank hours in lieu of extra duty.

THE MERITS OF THE DISPUTE

In the present matter, the dispute referred to the Tribunal is asking whether the 40 hours per month constraint of work on Prisons Officers of the Bank Scheme is in breach of the terms and conditions of the Officers as laid down in *paragraph 13.49* and in recommendation 6 at *paragraph 13.50* of the *PRB Report 2003 Volume II Part I*.

It would be pertinent to set what the aforesaid paragraphs of the *PRB Report 2003* provide for:

Bank of Prisons Officers

13.49 Crisis and emergency situations frequently occur nowadays and this causes disruption to the service. To help the Prisons Department effectively face such difficult times, we are introducing the service of a Bank of Prisons Officers. The Bank shall consist of officers who have retired or are on leave and shall provide support services in times of crisis or emergency.

Recommendation 6

13.50 We recommend that a Bank of Prisons Officers, comprising Prisons Officers who are off duty, on leave or retired, be created to perform Prisons Officers' duties as and when required in cases of crisis and emergency.

We also recommend that an allowance of Rs 300 should be paid for every three hours to each officer when called upon to attend duty.

The *PRB Report 2003* has in *paragraph 13.49* introduced the service of a Bank of Prisons Officers. *Paragraph 13.50* makes the recommendation that a Bank of Prisons Officers be created to perform Prisons Officers' duties as and when required in cases of crisis and emergency. It may be noted that the aforesaid *PRB* recommendation is silent as to the number of hours of duty and only states that the Bank of Prisons Officers would '*perform Prisons Officers' duties as and when required in cases of crisis and emergency*'.

The *PRB* in its subsequent reports, i.e. 2008, 2013 and 2016, has maintained the Bank of Prisons Officers Scheme, although it has continuously revised the allowance payable to an Officer called to attended duty under the Scheme in its various reports.

It has not been disputed that the relevant recommendation of the *PRB*, i.e. *paragraph 13.50* of *PRB Report 2003*, has not set the number of hours that the Bank of Prisons Officers should perform. The restriction to the number of hours was introduced with the *Commissioner of Prisons Circular 14 of 2015* dated 12 June 2015 which *inter alia* stated:

Henceforth, officers irrespective of ranks from all institutions (including PSS) shall not be allowed to work for an excess of 40 hours per month on "Bank". This implies that officers shall not be working at a stretch for several shifts.

The Disputant is contending that the introduction by the *Commissioner of Prisons Circular 14 of 2015* dated 12 June 2015 of a restriction of the hours of duty under the Bank Scheme to 40 hours per month breached the terms and conditions of service of Officers working under the Bank Scheme as has been prescribed by the *PRB* in its Reports since 2003. They are also concerned that if there are no Officers in hand, they would be in trouble when the crisis situation arises.

The Disputant also raised the issue that there has been a fundamental change by imposing the number of bank hours unilaterally asserting that this departure should have had the approval of the High Powered Committee pursuant to *paragraph 21.27* of the *PRB Report 2016 Volume 1*.

The Respondent, which is represented by the Mauritius Prisons Service, on the other hand does not agree to the Disputant's interpretation of the matter and has set the background to which the 40 hours of duty limitation was introduced via the *Commissioner of Prisons Circular 14 of 2015*, which was to ensure that there was a proper monitoring of the Bank Scheme and to thereby control any abuse thereof following the main observations of the Internal Control Report with regard to the Bank Scheme.

The Respondent has also put forward that the Bank hours are in the nature of overtime work and thus is over and above normal working hours. It cannot therefore be deemed to be a modification of an essential term of the contract of employment.

The contention of the Disputant that *Circular 14 of 2015* has breached the terms and conditions of Officers as laid down in the *PRB Report* by introducing a restriction on the number of hours per month must be considered.

The *PRB Reports* in relation to the Bank of Prisons Officers Scheme has never laid any condition pertaining to the number of hours a Prisons Officer under the Bank Scheme has to work. It has only provided that the Officer would only be required to perform duty in cases of crisis and emergency.

This is particularly true of the recommendation at *paragraph 13.50* of the *PRB Report 2003 Volume II Part I* where no required number of hours for duty under the Bank of Prisons Officers Scheme has been specified. It should also be noted that *paragraph 13.49* of the same *PRB Report* is similar in this regard.

It cannot therefore be said that the *Circular 14 of 2015*, in imposing the constraint of 40 hours per month, is going against or is in breach of the terms and conditions of Prisons Officers in the Bank Scheme as such a condition does not exist as per the relevant paragraphs of the *PRB Report 2003*.

Likewise, it should be noted that the standard working week for employees belonging to Disciplined Forces, as is the case of the Prisons Service, is as specified by Responsible Officers as per *paragraphs 18.5.2 and 18.5.5* of the *PRB Report 2016 Volume 1*.

The Disputant has also contended that the introduction of the 40 hours' constraint by *Circular 14 of 2015* is a fundamental change and would require to be referred to the High Powered Committee as per *paragraph 21.27* of the *PRB Report 2016 Volume 1*. This paragraph states as follows:

21.27 Any issue emanating from the implementation of the recommendations of this Report and requiring a fundamental change or is a departure from the main recommendation would continue to be referred to the High Powered Committee, chaired by the Secretary to Cabinet and Head of the Civil Service for consideration and appropriate decisions/actions.

From a perusal of the aforesaid paragraph, it applies to the implementation of a recommendation of the Report requiring a fundamental change or departure from the main recommendation. The main recommendation as per our terms of reference is at *paragraph 13.50* of the *PRB Report 2003*.

The constraint of 40 hours per month as imposed by *Circular 14 of 2015* cannot be said to require a fundamental change or departure to *paragraph 13.50* inasmuch as the aforesaid paragraph has not provided for the number of hours to be worked under the Bank of Prisons Officers Scheme. It should also be noted that the recommendation is not a recommendation

under the 2016 Report to which *paragraph 21.27* of the *PRB Report 2016* would apply. It cannot therefore be said that the matter should be referred to the High Powered Committee for consideration and appropriate decision.

In the present matter, it has not been contested that the hours of duty put in under the Bank Scheme are in the form of overtime work being performed over and above normal working hours. Its running can only be within the prerogative of management and does not constitute a unilateral modification of the contract of employment. This may be sufficiently gleaned from *JurisClasseur Travail Traité Fasc. 19-40 : Modification du Contrat de Travail* at *note 20*:

20. – Augmentation – *Hormis le cas des salariés à temps partiel (V. C. Trav., art. L. 212-4-3), la question central est celle de l’accomplissement d’heures supplémentaires (V JCl. Travail Traité, Fasc. 21 – 14). Les principes à l’œuvre sont assez simples : à l’intérieur du contingent, la gestion des heures supplémentaires constitue une manifestation du pouvoir de direction. Des heures supplémentaires imposées par l’employeur dans la limite du contingent légal et en raison des nécessités de l’entreprise n’entraînent pas modification du contrat de travail.*

...

La Cour de cassation rappelle fréquemment qu’à défaut d’un engagement de l’employeur et sous réserve de l’abus dans l’exercice de son pouvoir de direction, l’employeur est libre dans la gestion des heures supplémentaires.

The Tribunal cannot therefore find that the terms and conditions of Officers as laid down in *paragraphs 13.49* and under recommendation 6 at *paragraph 13.50* of the *PRB Report 2003 Volume II Part I* has been breached by constraining Prisons Officers to work only 40 hours per month under the Bank Scheme.

The dispute is therefore set aside.

**SD Shameer Janhangeer
(Vice-President)**

**SD Esther Hanoomanjee (Mrs)
(Member)**

**SD Rabin Gungoo
(Member)**

**SD Renganaden Veeramootoo
(Member)**

Date: 20th February 2017