

EMPLOYMENT RELATIONS TRIBUNAL

ERT/RN 143/2017

RULING

Before: -

Shameer Janhangeer	Vice-President
Marie Désirée Lily Lactive (Ms)	Member
Eddy Appasamy	Member
Kevin C. Lukeeram	Member

In the matter of: -

Mr Mahadeo ROOPSING

Disputant

and

THE STATE OF MAURITIUS

as represented by the

Ministry of Civil Service and Administrative Reforms

Respondent

The present matter has been referred to the Tribunal by the Commission for Conciliation and Mediation (the "CCM") pursuant to *section 69 (7)* of the *Employment Relations Act* (the "Act"). The Terms of Reference of the dispute reads as follows:

Whether I should be granted Incremental Credit as per paragraph 18.9.19 of the Pay Research Bureau (PRB) Report 2013 for the Bachelor in science degree in Management awarded to me in December 2015 or be paid the relevant non-pensionable lump sum for same as per para. 18.9.16 (v) of the PRB Report 2016.

The Disputant was assisted by his trade union representative Mr N. Gopee. Whereas, the Respondent was assisted by Miss B. H. Maherally, State Counsel instructed by Ms A.

Mohun, State Attorney. The Respondent has, in its Statement of Reply, raised a threefold Preliminary Objection in Law to the dispute in the present matter. This states as follows:

Respondent avers that the Tribunal has no jurisdiction to deal with the present matter inasmuch as-

(a) it does not constitute a labour dispute as defined in Section 2 of the Employment Relations Act, in particular paragraph (b) of the said definition, since the Disputant has exercised an option to be governed by the recommendations made in the Pay Research Bureau Report 2016;

(b) the terms of reference read together with the prayer at paragraph 17 of the Disputant's statement of case would require a fundamental change or departure from the relevant recommendations of the Pay Research Bureau Report 2016; and

(c) the Disputant is seeking to challenge an administrative decision.

Respondent therefore moves that the present matter be set aside.

The matter was therefore fixed for arguments on the Preliminary Objection in Law raised by the Respondent.

The Respondent called its representative, Mrs Sattamah Millien, Ag. Manager Human Resource at the Ministry of Civil Service and Administrative Reforms, to adduce evidence in support of the Preliminary Objections. The representative notably produced a copy of the original of the Option Form signed by the Disputant (Document A) on 15 April 2016. She also produced Circular Note No. 6 of 2016 dated 7 April 2016 (Document B) issued by the Ministry of Civil Service and Administrative Reforms ("MCSAR") for implementation of the *Pay Research Bureau ("PRB") Report 2016*; Circular Note No. 16 of 2016 dated 17 October 2016 (Document C) from MCSAR pertaining to the Addendum Report; Circular Note No.1 of 2017 dated 3 February 2017 (Document D) from MCSAR pertaining to implementations of the *PRB* recommendations regarding Higher Qualification Incentives ("HQI"). On being questioned by the Disputant's representative on whether there is a smooth transitional mechanism as recommended by the *PRB* at *paragraph 18.9.18A* in its report, Mrs Millien referred to the Standing Committee set up under aforesaid paragraph of the Addendum Report, where regulations should be devised to deal with the award of HQI; the Standing Committee did make recommendations wherever necessary.

State Counsel for the Respondent has, in relation to the first limb of the Preliminary Objection, notably submitted that the present matter does not constitute a labour dispute referring to the definition of same in the *Act* - in particular paragraph (b), as the Disputant has opted to be governed by the recommendations made in the *PRB Report 2016* as witnessed by the Option Form produced. According to Circular Note No. 6 of 2016, the effective date for the implementation of the *PRB Report 2016* is 1 January 2016. The Disputant has averred that he qualifies for an increment under the relevant recommendations at paragraph 3 of his Statement of Case. The issue is not about eligibility, but relates to remuneration or allowance. The Disputant is asking for the increment as per the *PRB Report 2013* when he is being governed by the *PRB Report 2016*. State Counsel referred to the ruling of the Tribunal in *S. Dawon and Mauritius Institute of Training and Development (ERT/RN 163/15 to ERT/RN 170/15)*. She submitted that the matter is purely and simply related to remuneration. An extract from Hansard relating to *Debate No. 15 of 13.06.03* was produced in relation to an amendment brought to the *Industrial Relations Act* in 2003.

State Counsel has further submitted from the definition of remuneration in the *Employment Rights Act* and produced the definition of the term '*emoluments*' from *Stroud's Judicial Dictionary of Words and Phrases*, submitting that '*emoluments*' has a wide definition. It is her humble submission that the HQI, which is also a lump sum payment, is part of emoluments. The dispute concerns whether HQI will apply or increments; the increment, according to the ruling, is part of remuneration or allowance of any kind. The Disputant is therefore debarred from reporting a dispute having exercised his option to be governed by the recommendations of the *PRB Report*.

State Counsel chose to argue the second and third limbs of the Preliminary objection together. Reference was made to paragraph 17 of the Disputant's Statement of Case, whereby the Disputant is praying to be awarded an incremental credit for his higher qualification in line with *paragraph 18.9.19* of the *PRB Report 2013*. A copy of *paragraph 21.27* of the *PRB Report 2016* was produced referring to the recommendation that the matter should be referred to the High Powered Committee ("HPC") where there would be a fundamental change or departure from the main recommendation of the 2016 Report. According to paragraph 2 of the Disputant's Statement of Case, the matter has already been referred to the HPC and a decision was taken. This administrative decision is now being contested before the Tribunal. In relation to the third limb, State Counsel submitted that it appears that a decision was taken by the Standing Committee (set up under *paragraph 18.9.18* of the *PRB Report 2016*) referring to a letter dated 8 August 2016 annexed as Document 3 to the Disputant's Statement of Case; this

decision is being presently contested before the Tribunal, which is not the proper forum to do so.

Mr N. Gopee has made a statement on behalf of the Disputant in reply to the arguments of the Respondent. Under the first limb of the Preliminary Objection, Mr Gopee stated that it is not disputed that the Disputant signed an Option Form and offered his consent to be governed by the recommendations of the *PRB* in its 2016 report. However, this does not debar the Disputant from disputing the interpretation of any of the recommendations of the report so long as the dispute does not relate to the substance of the report. The present dispute was not rejected by the President of the CCM nor did the Respondent submit any Preliminary Objection at that instant. Due process requires that the Respondent raises the objections in *limine litis* at that stage.

Mr Gopee has stated that the present case concerns the erroneous application of the *PRB* recommendation regarding HQI in light of *paragraph 18.9.18A* of the *Addendum Report* (copy of which was produced). Owing to the confusion that HQI might create, the *PRB* has entrusted the Standing Committee to look into the smooth transition mechanism so that there is no dispute over either incremental credit or HQI. The *Act* restricts disputes over the substance of the recommendation as far as remuneration and allowance is concerned, but this cannot be construed as a bar to the right of the Disputant to report a dispute over the applicability and implementation of the recommendation. The Disputant contends that the recommendation is wrongly being implemented. A public officer is not debarred from reporting a dispute over the applicability, interpretation and implementation of the recommendation of the *PRB*. The jurisdiction of the Tribunal can only be disputed on grounds as set out in *section 71* of the *Act*, which does not apply to the present dispute. Under *section 97* of the *Act*, the Tribunal has to maintain good employment relations.

Under the second limb of the Preliminary Objection, Mr Gopee stated that the prayer of the Disputant at paragraph 17 of his Statement of Case does not motivate a fundamental change in the substance of the relevant recommendation of the *PRB Report 2016* nor does it motivate any departure from same as claimed by the Respondent. He produced a copy of *paragraph 21.7* of the *PRB Report 2016* relating to the effective date of the 2016 report. He referred to the definition of the word '*prospectively*' in the case of *Government Services Employees Association and The State of Mauritius as represented by the Mauritius Fire and Rescue Services (ERT/RN 65/17)*. He also submitted a copy of *paragraph 18.9.16 (v)* of the *PRB Report 2016* dealing with HQI. Under the third limb of the Preliminary Objections, the Disputant has contended that he is not challenging the administrative decision of the HPC but just simply disputing the implementation, applicability and interpretation. Mr Gopee also stated that

definition of remuneration under the *Employment Rights Act* does not apply to public officers and applies to the private sector.

The Respondent, under the first limb of the Preliminary Objection in Law, contends that the dispute does not constitute a labour dispute as defined at paragraph (b) of the meaning of labour dispute under *section 2* of the *Act*. In fact, the Respondent is referring to the following provision of the law:

“labour dispute” –

...

- (b) *does not, notwithstanding any other enactment, include a dispute by a worker made as a result of the exercise by him of an option to be governed by the recommendations made in a report of the Pay Research Bureau or a salary commission, by whatever name called, in relation to remuneration or allowances of any kind;*

As per the Terms of Reference of the present matter, the Tribunal is being asked to enquire into whether the Disputant should be granted incremental credit as per *paragraph 18.9.19* of the *PRB Report 2013* for the BSc in Management awarded to him in December 2015 or be paid a non-pensionable lump sum for same in accordance with *paragraph 18.9.16 (v)* of the *PRB Report 2016*.

It should also be noted that the Disputant, in his Statement of Case, is praying for ‘*the Tribunal to reinstate him in his right to be awarded an incremental credit for his higher qualification in line with paragraph 18.9.19 under Recommendation 7 of PRB Report 2013*’.

It is useful to set out the aforesaid paragraphs of the aforementioned *PRB Reports*. *Paragraph 18.9.19* of the *PRB Report 2013 Volume 1* provides as follows:

Recommendation 7

18.9.19 ***We recommend the grant of one incremental credit for each level of additional qualification obtained, whether partly relevant or not, subject to a maximum of three, as follows:***

- | | | | |
|-------------------|-------------------------------|-----------------|--|
| <i>(a)</i> | <i>Bachelor Degree</i> | <i>-</i> | <i>One increment</i> |
| <i>(b)</i> | <i>Master’s Degree</i> | <i>-</i> | <i>Two increments [inclusive of the increment at (a)]</i> |

- (c) **Doctorate and above - Three increments [inclusive of the two increments at (b)]**

Moreover, paragraph 18.9.16 (v) of the PRB Report 2016 Volume 1 has to be considered in the whole of paragraph 18.9.16 and this provides as follows:

Recommendation 4

18.9.16 We recommend the payment of lump sum rates of Higher Qualification Incentives (HQI) as per table at (v) for qualifications which are directly relevant to the performance of the duties of the grade and are higher than the qualifications specified in the scheme of service for the grade and subject to the following conditions:

- (i) the additional qualifications are obtained following an examination and are duly recognised by the Mauritius Qualifications Authority or the Tertiary Education Commission;
- (ii) where different qualifications are laid down in a particular scheme of service, the highest one would be taken as the basic qualification for the purpose of determining eligibility for payment of HQI;
- (iii) only officers holding a substantive appointment would be considered for the grant of HQI for additional qualifications;
- (iv) officers who have already benefited from the payment of HQI for additional qualifications in one capacity would not be granted HQI anew for the same qualifications in another capacity;
- (v) the payment of a lump sum rate of HQI for additional qualifications should be as follows:

Qualification	Amount (Rs)
Doctorate and above including specialist qualifications for medical profession. ^v i	30000
Master's Degree	20000
Bachelor Degree	16000

an officer should not be eligible more than twice in his or her career.

As is apparent from the above mentioned provisions of the *PRB Reports*, the Disputant is claiming incremental credit depending on the qualification as per the 2013 report; or the payment of a lump sum for HQI pursuant to the conditions set out being fulfilled in accordance with the 2016 report.

Would the recommendation of the payment of the increment pursuant to *paragraph 18.9.19* of the *PRB Report 2013* relate to ‘*remuneration or allowances of any kind*’? It should be noted that this recommendation directly relates to the issue of the grant of incremental credit. From *paragraph 18.9.1* of the *PRB Report 2013*, increment has been described as follows:

Increment

18.9.1 Most of the grades in the Public Sector have the salaries which are in scales. A salary scale has an initial and a top salary point. Movement from the initial to the top salary point is incremental. A few grades have a flat salary (one point salary). When the salary of an officer is on an incremental scale, the holder is not entitled to draw any increment as of right. An officer, on appointment, is granted the initial salary of the salary scale of the grade. The guaranteed salary for an incumbent in the grade is the initial salary and any movement in the scale has to be earned. Increment is a method for rewarding those who have demonstrated adequate yearly progress and whose work and conduct have been satisfactory.

A similar description of increment has also been offered by the *PRB* at *paragraph 18.9.1* of its 2016 report. As may be gleaned from this description, increment is directly related to salary. Would it therefore fall under the ambit of the term ‘*remuneration*’? Although the term ‘*remuneration*’ has not been defined in the *Act*, the following may be noted from what the Supreme Court stated in *A.J. Maurel Construction Ltee v Froget* [2008 MR 6]:

Remuneration includes salary and the benefits that may be said to go with the salary or “the salarium” which includes the “accessories:” see Jean-Emmanuel Ray Droit du Travail, Droit Vivant p. 173, para 123.

Moreover, it would be appropriate to note what the Supreme Court stated in relation to the term ‘*remuneration*’ in the case of *Stella Insurance Co Ltd v Ramphul* [1987 MR 151]:

It should, in our view, mean, to quote from the editor of Stroud's Judicial Dictionary who thus paraphrases the ratio decidendi of the English case just referred to: "everything which is quantifiable and paid to the worker."

The following may also be noted from *J. Pélissier, G. Auzero and E. Dockès in Droit du travail, Précis Dalloz, 26^e édition, p.875, 876, note 851* on the issue of remuneration in relation to salary:

Une distinction est ainsi introduite entre une notion large de rémunération de l'emploi, et une notion plus étroite de salaire, qui serait essentiellement le prix de base du travail fourni. Mais les expressions de « salaire » et de « rémunération (du travail) » sont souvent employées, dans le Code du travail, comme synonymes. Il faut donc admettre que « salaire » possède, dans la langue du droit du travail, un sens étroit (salaire de base) et un sens large (ensemble du salaire de base augmenté des « compléments du salaire », qui en sont des « éléments constitutifs »), dans lequel il a pour synonyme « rémunération ».

It is thus clear that as increment is directly linked to salary, it would amply fall within the ambit of the term 'remuneration' and thus a dispute concerning the grant of same would not be deemed to be a labour dispute pursuant to paragraph (b) of the meaning of labour dispute under *section 2* of the Act.

It is also pertinent to note that it has not been disputed that the Disputant has signed the Option Form opting to be governed by the recommendations of the *PRB Report* as is evidenced by Document A produced. It has not also been disputed that the Disputant applied for the award of incremental credits under the *PRB Report 2013* in or around June 2016, which is after the effective date implementation of the *PRB Report 2016* and after he signed the Option Form to be governed by same on 15 April 2016.

It now remains to be seen if the payment of a lump sum for HQI pursuant to *paragraph 18.9.16 (v)* of the *PRB Report 2016* would fall within the ambit of the term 'remuneration' as has been contemplated at paragraph (b) of the meaning of labour dispute under *section 2* of the Act. A scrutiny of the whole of *paragraph 18.9.16* of the *PRB Report 2016* reveals that the payment of the lump sum is not automatic and is subject to certain conditions as set out therein.

The payment of the lump sum comprises the payment of an amount of money depending on the type of qualification as set out in the table at *paragraph 18.9.16 (v)* of the *PRB Report 2016*. This payment is normally made in the salary of the officer and would thus be part of the salary of the beneficiary. Despite the appellation of a lump sum, its payment, whether one off or otherwise, is made as part of the salary of the officer and would thus be within the officer's remuneration.

Given that the legislator has contemplated the exclusion of disputes pertaining to recommendations of the *PRB Report* in relation to '*remuneration ... of any kind*' from the meaning of a labour dispute, the payment of the lump sum would fall within the wide ambit of paragraph (b) of the meaning of labour dispute under *section 2* of the *Act*.

The Disputant would thus be barred from bringing a dispute for the payment of a lump sum for his BSc in Management as per *paragraph 18.9.16 (v)* of the *PRB Report 2016* in view of the exclusion to the meaning of a labour dispute made at paragraph (b) under *section 2* of the *Act*.

The Tribunal has noted that it is the argument of the Disputant that his dispute relates to the application, interpretation and implementation of the *PRB* recommendations and not to the substance of same. The Tribunal, in view of the Terms of Reference of the present dispute and of the prayer sought by the Disputant as set out in his Statement of Case, cannot concur with this argument.

Indeed, a perusal of the Terms of Reference reveal that the Disputant is asking to be granted an incremental credit or be paid a non-pensionable lump sum. This clearly demonstrates that the Disputant is first and foremost seeking the award of an increment or of a lump sum pursuant to the relevant paragraphs of the *PRB Reports* of 2013 and 2016 and is not *per se* principally concerned with the application, interpretation or implementation of the aforementioned recommendations of the *PRB Reports* as cited in the Terms of Reference.

Likewise, the Disputant, at paragraph 17 of his Statement of Case, is praying for the Tribunal '*to reinstate him in his right to be awarded an incremental credit for his higher qualification ...*'. This again clearly shows that the Disputant is not primarily seeking the interpretation or the applicability of the *PRB* recommendation but the award of the increment pursuant to the relevant paragraph of the *PRB Report*.

At this juncture, it would be useful to reflect on what was stated by the Supreme Court in *Federation of Civil Service and Other Unions and others v The State of Mauritius and anor.* [2009 SCJ 214]:

Should he of his own free will, however, opt to be governed by the recommendations in the new report, he is presumed like any citizen to know the law, including the new provisions, and cannot declare a dispute in relation to his remuneration or allowances.

It has also been noted that the representative of the Disputant has stated that the present Preliminary Objections in Law to the dispute should have been raised before the CCM and not before the Tribunal. The Disputant has also contended that the jurisdiction of the Tribunal can only be disputed on grounds as set out in *section 71* of the Act, which does not apply to the present dispute.

The Tribunal, in view of the contentions of the Disputant, would refer to a ruling of the then Permanent Arbitration Tribunal in *Mrs C. M. Tatiah and Development Bank of Mauritius (RN 758)* delivered on 4 August 2004, which was followed in the matter of *S. Dawon and Mauritius Institute of Training and Development (supra)*. Therein, the Permanent Arbitration Tribunal notably stated:

*The Tribunal wishes to address itself first on whether once a referral is made, it is bound to adjudicate on the dispute. Indeed Section 83 of the Industrial Relations Act 1973 as amended states “Where any dispute is referred to the Tribunal by the Minister under section 82, the Tribunal shall, with all diligence, inquire into the dispute and make an award on it”. Section 5 of the **Interpretation and General Clauses Act** defines “shall” as “may be read as imperative”. (the underlining is ours).*

Are we to hear any dispute referred to us by the Minister if the Tribunal finds that the dispute does not fall within the legal parameters of an industrial dispute as per the Industrial Relations Act 1973 as amended?

Russell on Arbitration, 18th Edition by Anthony Walton Q.C. at page 73 reads:

*“It can hardly be within the arbitrator’s jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. However, an arbitrator is always entitled to inquire whether or not he has jurisdiction. (see **Brown v. Oesterreichischer Waldbesitzer R.G.m.b.h. (1954) (Q.B.8)** An umpire faced with a dispute whether or not there was a contract from which alone his jurisdiction, if any, deal with the matter at all and leave the parties to go to the court, or he can consider the matter and if he forms the view that the contract upon which the claimant is relying and from which, if established, alone his jurisdiction can arise is in truth the*

contract, he can proceed accordingly. (Per Roskill J. in Lunada Exportadora and others v. Tamari and Sons and Others (1967) L. Lloyd's Rep. 353 at page 364)."

The Tribunal concedes therefore that whenever a compulsory arbitration is referred to it, it has no choice than to inquire into the dispute provided it satisfies the Tribunal that it is an industrial dispute.

It is trite understanding that the Tribunal will have no jurisdiction to hear a dispute which is not a labour dispute as defined in the *Act*. The Tribunal cannot therefore be precluded from being satisfied as to whether the dispute before it is a labour dispute as is defined under the *Act*.

Under *section 71* of the *Act*, the Tribunal cannot enquire into a labour dispute where same relates to any issue within the exclusive jurisdiction of the Industrial Court; or which is the subject of pending proceedings before the Commission or any court of law. The Tribunal, before reaching this threshold, must however be satisfied as to whether the dispute before it amounts to a labour dispute in the first place. Only after having been satisfied of same can the Tribunal determine whether the labour dispute would fall within the exclusions provided for in the aforesaid section. The Tribunal is therefore entitled to satisfy itself as to whether the dispute is indeed a labour dispute as defined under the *Act*.

The Tribunal therefore finds that the first limb of the Preliminary objection in Law raised by the Respondent must succeed. As the Tribunal has found that the present dispute does not constitute a labour dispute as is defined under the *Act*, the Tribunal does not find it necessary to consider the other two limbs of the Preliminary Objection in Law raised by the Respondent.

The present dispute is therefore set aside.

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

**SD Marie Désirée Lily Lactive (Ms)
(Member)**

**SD Eddy Appasamy
(Member)**

**SD Kevin C. Lukeeram
(Member)**

Date: 30th March 2018

