

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 89/23

Before

Indiren Sivaramen	Acting President
Greetanand Beelattoo	Member
Christelle Perrin D’Avrincourt	Member
Ghianeswar Gokhool	Member

In the matter of:-

Mrs Hema Devi Gya (Complainant)

And

**Union of Private Secondary Education Employees
(Respondent)**

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(9)(b) of the Employment Relations Act, as amended (hereinafter referred to as “the Act”). Both parties were assisted by Counsel. The terms of reference of the point in dispute read as follows:

“Whether I should be paid the salary as per the PRB Report 2021 as I was aligned on the Chessworth Report of 1988 followed by all PRB Reports up to 2021.”

The Tribunal proceeded to hear the case. The Disputant deposed and she stated that she was Clerk/Word Processing Operator at the Respondent. She joined the Respondent in 1991 and previously she was at the Federation of Progressive Union (FPU) which was a Federation to which the Respondent was affiliated. She stated that initially she was a Clerk/Typist and subsequently the Pay Research Bureau (PRB) changed the appellation to Clerk/Word Processing Operator. She averred that she joined the FPU on the basis of the Chesworth Report. She stated that there were other members of staff there who were already aligned with the Chesworth and PRB reports. She produced copies of her contract with the FPU (Doc A) and with the Respondent (Doc B). She maintained that

she was aligned with all PRB Reports which came after the Chesworth Report (except for the PRB Report 2021). She added that she joined Respondent in 1991 and she mentioned how her salary evolved from 1993 to 2016. She stated that in 2016 her salary increased to Rs 26,675. She also stated that with her long service increment in 2018, her salary reached Rs 30,950. She produced copies of some of her banks' statements of account (Docs C2 to C33). She suggested that initially she was aligned automatically on the report of the PRB but later with new executive committees, she was asked to make a request first and then she was aligned on the PRB report.

The Disputant averred that one Mr Jugdamby had asked her for a list of all members of the Respondent and when she refused to give same to the latter, the said Mr Jugdamby got angry with her. She added that previously Mr Paraouty was the President of the Respondent and during that time, she had had no problems. She started having problems when the said Mr Paraouty lost the elections at the union and left the Respondent in or around 2018. She also stated that her husband had been dismissed from his employment.

Disputant stated that she was providing her services as Clerk/Word Processing Operator but that on the website for the office, her job appellation was put as Administrative Officer. Then she used the job appellation of Administrative Officer. She stated that her 'long service increment' was approved by the new committee at the Respondent in 2018. She suggested that this was as per the report of the PRB. She added that after she has been granted her 'long service increment' in 2018, her salary has remained the same from 2019 to 2023. She stated that in 2022 after 32 years of service, the Respondent tried to negotiate a new contract with her where she would be governed by the National Remuneration Board (the "NRB" instead of the PRB). She did not agree to same. She stated that this time the executive committee at the Respondent did not want to align her on the latest PRB report. She stated that her basic salary is Rs 30,950, that is, the top salary of Rs 30,175 as per the PRB Report 2016 together with the long service increment. She stated that she was supposed to have two increments but finally obtained only one increment and did not receive a second increment which was due to her in 2019. She also stated that she is not being paid the top salary of Rs 34,825 for her grade of Clerk/Word Processing Operator as per the PRB Report 2021.

In cross-examination, she stated that she joined the FPU on 21 December 1989 and Respondent in 1991. She stated that she was earning Rs 2700 when she joined Respondent. She conceded that her husband was not working at the Respondent. She stated that she prepares her own pay slip and hands it over to the Treasurer for necessary action by the 'committee' of the Respondent. She stated that those who joined Respondent before her as well as those who joined after her, are paid on the basis of the PRB report.

A witness was called to depose on behalf of the Disputant and he stated that he was in the Private Secondary School sector from 1978 up to the year 2000 and then worked at Charles Telfair, Curtin Mauritius for some 22 years. He has now retired. He was at one time the Secretary of the FPU and has acted as member of the Executive Committee of Respondent. He stated that he is the one who drafted the contract of employment of Disputant with the FPU. He stated that Disputant was then given the salary of a Typist aligned on the salary scale from the Chesworth Report which governed the public sector. He, however, mentioned that when Disputant left the FPU, she entered into a new contract with the Respondent. The witness added that a decision was taken by the FPU to align its administrative staff on the scale of the 'top Typist' in the Public Sector. He stated that when the Disputant joined the FPU there were already people working there and she had the same salary scale except that she was working part-time. He added that the Respondent took the decision to align Disputant on the PRB scale. He explained the rationale for same and referred to the struggle of the union for uniform conditions of service for employees of Private Secondary Schools and those in schools in the public sector. He suggested that the union was of the view that the same principle should apply for employees of the union, and the Committee decided to align the conditions of service of Disputant with those of Clerk/Typist.

The witness stated that there was no transfer of Disputant from the FPU to Respondent but that there was simply a change of employment. He stated that he was a member of both organisations and formed part of the discussions which were held in relation to the offer of employment made by the Respondent to Disputant. He suggested that the Respondent had informed the FPU that the Disputant would be aligned on the PRB scale because this was the policy of the Respondent.

In cross-examination, the witness stated that they did not find it necessary to include reference to the Chesworth Report or PRB Report in the contract of Disputant since the salary scale was inserted in the said contract. He accepted that Disputant was working as a part-timer at the FPU whilst other employees who were working at the FPU before the latter, were full-time employees. He agreed that he is no longer a member of the Respondent and will not be able to refer to the stand of the Respondent today. He stated that what mattered to them, at that time, was that the officer had a basic qualification, the required skills, and the commitment to do the work and was a reliable person. He stated that when employees were recruited, they were not asked whether they had particular qualifications. The focus was on whether the person could deliver as required.

Another witness was called to depose on behalf of Disputant and he stated that he had occupied different positions at the Respondent including as President, Vice-President and Secretary of the said union. He stated that the educators in Private Secondary Schools were claiming that they should be aligned on the same conditions of service as per the PRB report. He stated that the Disputant was right from the beginning aligned on the

PRB Report. Each new PRB Report was extended to the Disputant. He stated that when Disputant joined in 1990, the decision was taken that the salary of the PRB Report would be extended to her. He stated that he could not find any reason why the alignment of Disputant on the PRB report was stopped.

Another witness was called to depose on behalf of Disputant and he stated that he joined the Respondent in the nineties and left the managing committee of Respondent in or around 2018. He occupied several positions at the Respondent including as President, Vice-President, Secretary and Assistant Secretary of the union. He stated that Disputant was already working at the Respondent when he headed the Respondent. He stated that executive members before him had already aligned Disputant on the salary of the PRB report and he continued this practice. He stated that during the 25 years that he has been at the Respondent, he has always aligned the salary of Disputant on that proposed in the (relevant) PRB Report. In 2018, following the elections at the Respondent, he left the Respondent, and a new executive committee took over at the Respondent.

In cross-examination, the witness was confronted with a document, and he stated that the part mentioned to him in the document referred to the conditions of service of the PRB report. He maintained that the salary of the Disputant was always governed by the relevant PRB report.

An Administrative Clerk then deposed on behalf of Disputant and she stated that she worked at the FPU from 1989 to 1998 as Typist/Clerk. She stated that she was working at the FPU and she was sent to work for three days at the Respondent whilst working three days at the FPU. She stated that she was earning Rs 2400 at that time. She suggested that this salary was based on the PRB report. She added that everyone who was working at the FPU was being remunerated based on the PRB report. In cross-examination, she referred to her qualifications though she stated that she was not asked about her qualifications during her interview. She left the FPU in 1998.

The Secretary of the Respondent deposed on behalf of Respondent at another sitting of the Tribunal. He stated that he has been a member of the Executive Committee of the Respondent since 2006 or 2007. He stated that the contract between Disputant and the Respondent is dated 10 December 1991. He stated that he would not be able to answer when it was put to him that Disputant claims that she was aligned on the Chesworth report when she joined the FPU. He stated that in the contract between Disputant and the Respondent, there is no mention that Disputant is to be governed by the terms and conditions of the public sector or that his salary would be aligned on that prevailing in the public sector. He stressed that there was no one who was earning salary in line with the PRB report at the Respondent. He stated that a scale is a scale, and that this does not mean that the salary of an officer is aligned on a particular salary report. He stated that the Administrative Clerk who deposed on behalf of Disputant did not work at the

Respondent and that there was no record that she had worked at the Respondent. He stated that the Disputant has made written requests for an increase in her salary, and she was granted increases in her salary during a certain period of time. He however maintained that the increases were not based on the PRB report but were based on the cost of living, on humanitarian grounds and so on. He agreed that every time there was a PRB report, there was a request for a salary increase. He stated that the Respondent has not granted an increase in salary every time there was such a request. He suggested that in the year 2016, he drew the attention of the committee that the Respondent was agreeable to give a salary increase to Disputant but that same was not based on the PRB report. He produced a copy of the minutes of proceeding of a meeting of the Executive Committee of the Respondent where it was mentioned, inter alia, that "*As such Seena [meaning Disputant] is not governed by the Regulations of the PRB*" (Doc F). He maintained that no one at the Respondent was aligned with the salaries as per the PRB reports. He also stated that he did not witness any harassment towards Disputant.

The Secretary of the Respondent stated that in 2021 the Disputant had made another request for an increase in her salary and the President of the Respondent then informed the latter in writing that she was not aligned on the PRB but on the NRB. She was told that the Respondent would consider at the appropriate time whether she should indeed be granted an increase in salary. He stated that in 2018 the Disputant spoke with the President of the Respondent and him mentioning about her child who was studying abroad and asking for an increase in salary. The matter was taken to be discussed in the Executive Committee and on humanitarian grounds, the Committee finally agreed to grant an increase to Disputant, but the increase was as from July 2018. He produced a copy of the notes of the meeting (Doc G). He however agreed that in the said notes there is no mention that the increase is to be applied as from July 2018. He also accepted that the signature on a payslip of Disputant which was shown to him was his. He produced copies of six payslips (Docs H to H5). He suggested that there was a discussion and that arrears of salary increase had been paid to the Disputant by mistake. It was then agreed that since this concerned a member of staff, no claim would be made to the Disputant to reimburse the arrears paid to her. He went on to say that it was Disputant herself who prepared her own payslip and that there was an element of trust and that there was no "scrutiny" of everything done. He maintained that Disputant was not governed by the PRB report.

In cross-examination, the Secretary of Respondent stated that the Respondent deals with some seventy-six schools and has a lot of work to carry out. He, however, stated that most of the work is carried out by them and not by the Disputant. He was referred to the evidence of the witness who drafted the contract of employment of Disputant with the FPU. The Secretary of the Respondent, however, maintained that the contract did not mention that the Disputant would be governed by the Chesworth report or PRB report.

He added that it could have been mentioned in the contract that the salary of Disputant would be governed by the relevant report. He did not agree that it was only after the PRB Report 2021 that it was decided not to align the Disputant on the PRB report. The Secretary stated that he believed that there had been an offence when Disputant took arrears for a period prior to July 2018 when this had not been approved. He added that he believed that the Respondent had erred when it did not report the matter to the police. He averred that he did not know the Administrative Clerk who deposed as a witness on behalf of Disputant.

A witness was then called to depose on behalf of the Respondent, and she stated that she worked from February 2017 up to January 2022 at the Respondent. She worked part-time at the Respondent and at the Credit Union. She stated that her salary was not aligned on the PRB report but that her salary was governed by the NRB. In cross-examination, she stated that she was an Assistant Administrative Clerk. She stated that she was earning around Rs 15000 from the Respondent. She did not have her contract of employment with her, however.

The Tribunal has examined all the evidence on record including the submissions of both counsel and all documents produced. The Respondent has taken two plea in limine which read as follows:

“Respondent submits that:

- 1. The present case is not a Labour Dispute within Section 2 of the Employment Relations Act 2008 per se, it is based on an alleged inclusion of an ‘implied acquired right’ which determinations rest within the sole jurisdiction of the Industrial Court.*
- 2. The nature of the present case rest solely on the declaratory statement that Disputant salary should be in line and continue to be in line with salary scale of corresponding post as per PRB 2021 report as such this is a matter lying solely within the jurisdiction of the Industrial Court.*

Respondent therefore moves for this Application to be set aside.”

The Tribunal notes that the term ‘implied acquired right’ has not been relied upon by the Disputant. Reference has been made to ‘acquired right’ and then only in the alternative as per paragraph 25 of the Statement of Case of the Disputant. The Disputant, on the other hand, has relied on an ‘implied term of the contract’. There is nothing to suggest that the notion of ‘acquired right’ or ‘implied term of a contract’ falls within the exclusive jurisdiction of the Industrial Court. The present dispute is a dispute between a worker and an employer and relates wholly or mainly to wages. The dispute is not a claim for unpaid salary (in the nature of a debt) but is a “*revendication salariale*”. This is clearly within the jurisdiction of the Tribunal which has been set up as an administrative tribunal

to deal with labour disputes. The Tribunal is not satisfied that the dispute as referred to the Tribunal is not a labour dispute as defined under section 2 of the Employment Relations Act. Also, there is nothing to suggest that the “*revendication salariale*” is within the sole jurisdiction of the Industrial Court. The Tribunal thus finds no merits with the two plea in limine raised on behalf of Respondent and both plea in limine are set aside.

The Tribunal will thus proceed to consider the merits of the dispute. Witnesses have deposed on behalf of both parties. Witnesses called on behalf of Disputant adduced evidence to the effect that the salary of Disputant was aligned on the salary in the Chesworth report and in each every successive PRB report. Amongst those witnesses were two past Presidents of the Respondent who confirmed that this principle of aligning the salary of the Disputant with the Chesworth and PRB reports was adopted and that this was as per the intention and policy of the Respondent. Witnesses called on behalf of Respondent, on the other hand, stated that the salaries of the members of staff of the Respondent were not aligned on the PRB report. Disputant deposed before the Tribunal and produced a number of documents including copies of her banks’ statements and of her contracts of employment with the FPU and with Respondent.

Despite the evidence given on behalf of Disputant, both contracts of employment made no mention at all to the Chesworth report or the PRB report. There is oral evidence that the PRB report was every time extended to the Disputant (up to the PRB Report 2016) though there is no documentary evidence (except for Doc F which will be dealt with later) which shows the decision of the Respondent through its executive committee in relation to increases in salary granted to Disputant following the publication of a PRB report. One of the witnesses for the Disputant stated that either the executive committee took the decision on its own initiative or if ever there was “*bann oubl*”, Disputant would remind them. Another witness for the Disputant replied that the current committee members can still ignore the policy referred to by the former committee members since they have got the mandate to do that. He, however, later stated that they would be wrong if they did that. The same witness explained how the salary offered by the FPU was arrived at. He stated that the FPU needed someone who would work for 2 or 3 days per week. Thus, there was a salary scale from the Chesworth report and the FPU decided to look at how in the private sector, they would convert a full-time salary scale into a part-time scale. They then took the salary scale of the Chesworth report and calculated how the salary scale should be if one works two or three days per week. The Disputant was then given the salary as per that scale (as a part-timer).

It is apposite to note that though it is averred on behalf of the Disputant that her salary is aligned on the PRB report, it is also averred by witnesses who deposed on behalf of the latter that the Disputant was however not governed by the conditions of work as per the relevant reports. In the minutes of the Executive Committee of Respondent held on 1 July 2016 (Doc F – see above), there is the following under the item 6 AOB : “*New salary*

to Seena as per PRB 2016 with arrears as from January 2016 (Approved). As such Seena is not governed by the Regulations of the PRB". The Tribunal has some difficulty in ascertaining the exact meaning of the second phrase, the more so that it starts with the words "As such". As per the ordinary dictionary meaning, for example as per Cambridge Dictionary, "as such" means "in the true or exact meaning of the word or phrase". Also, a term such as "Regulations" has been used when referring to the PRB (may be more relevant in relation to regulations made following recommendations of the NRB). As per one witness for the Disputant, this would refer to the fact that Disputant (for whom "Seena" would stand for in the said minutes) was not governed by any other conditions of the PRB report. On behalf of the Respondent, it was submitted that despite the new salary granted to Disputant, the Committee stressed that Disputant was not governed by the PRB report.

The Disputant is suggesting that the alignment of her salary on the PRB report is an implied term of her contract of employment and should thus be complied with. A term can be read or implied in a contract only in rare and exceptional cases. Indeed, an implied term may be read in a contract to ensure compliance with statute or common law such as the obligation of safe conveyance in a contract of carriage (vide **Dwarika and anor. v. Moka-Flacq Transport Ltd, 1973 MR 113**). A term may also be implied in a contract if it is necessary to ensure that the contract 'works' or 'operates', or to ensure a custom or usage in a particular industry or because it is a necessary implied term, such as, that a discretion must be exercised in good faith. A term may also be implied in a contract in view of the previous dealings between parties, for example, how they have acted towards each other over years.

A term may be 'implied' in the contract of employment of Disputant with Respondent if the Disputant can satisfy the Tribunal on a balance of probabilities that the term forms part of "un usage de l'entreprise" which has been applied in such a manner over a sufficiently long period of time that it has become "un élément du contrat". Three conditions, that is, (1) "constance" (2) "généralité dans le paiement" and (3) "fixité dans le montant" must exist for the said "usage de l'entreprise", which would here be 'alignment on the PRB report' (as alleged on behalf of the Disputant) to be binding on the parties. The Tribunal does not find the alternative prayer of Disputant (as per paragraph 25 of the Statement of Case of Disputant), that her alignment with successive PRB reports was an acquired right, to be relevant in the present matter. Indeed, as per the terms of reference the issue has more to do with "Whether I should be paid the salary as per the PRB report 2021 ..." and the Tribunal finds that Disputant cannot have an acquired right in relation to the PRB report 2021 to which she has not yet benefitted, unless 'alignment on the PRB report' is 'un usage d'entreprise' which has become binding on the parties (satisfying the same three conditions mentioned above).

The Disputant has curiously, at the same paragraph 25 of her Statement of Case, also tried to rely on the principle of *Communis Error Facit Jus*. The Tribunal has not been

impressed by the pertinence of such a principle in the present matter. Also, in our mind, this does not assist the Disputant in establishing the three conditions which must be met for the Tribunal to be satisfied that there was an “*usage d`entreprise*” which had become binding on the parties. The former officers of the Respondent who have deposed on behalf of Disputant to show that it was agreed that Disputant would be aligned on the PRB report have not explained why this was not expressly included in her contract of employment which was a fairly detailed contract including provisions in relation to hours of work, sick leaves, leave without pay, travelling allowances, overtime, other benefits and so on. The Tribunal finds that alignment with the Chesworth report or PRB report (even if only for the purposes of salary) is an important condition, if this was the intention of parties, and should have been included in writing in the contract of employment, the more so bearing in mind the nature of the activities of Respondent (a trade union representing the interests of its members who are employees) and the duties of Disputant herself as per her own contract of employment and the evidence adduced by the former officers of Respondent. There is also no evidence at all that such a term was ever included in any other contract of employment of any other officer employed by Respondent. On the other hand, there is evidence, which has remained unchallenged from the Assistant Administrative Clerk called to depose on behalf of Respondent that she worked from 2017 to 2022 at the Respondent and that her salary was not governed by the PRB report. Even Mr Paraouty who deposed before us could not confirm if the said Assistant Administrative Clerk was paid on the basis of the PRB report. This certainly raises doubt as to whether employees of the Respondent were indeed aligned on the PRB report. In the light of all the evidence on record, the Tribunal is not satisfied on a balance of probabilities that there was “*généralité dans le paiement*” (though the Tribunal bears in mind that this condition may, in an appropriate case, be satisfied even if applied only to one employee if the latter is the only employee forming part of a category of employees).

Also, even the evidence adduced on behalf of Disputant does not suggest that there was automatic alignment every time a PRB report was published. There is instead evidence that at times there were “*bann oubli*” so that Disputant had to remind the Respondent for any action to be taken. Also, whilst Disputant referred to her different salaries from 1993 to 2018, no corresponding extracts of the relevant PRB reports were produced. Only copies of extracts of the PRB Reports 2016 and 2021 were produced (Docs D and E respectively). As per Doc D, the salary scale for Clerk/Word Processing Operator under the Chapter dealing with “Private Secondary Schools” in the PRB report 2016 was as follows:

PSS7: Rs 14050 x 275 – 15150 x 300 – 15750 x 325 – 17700 x 375 – 19575 x 475 – 21950 x 625 – 23200 x 775 - 30175

Though the Tribunal may take notice that there was an Addendum Report to the 2016 PRB Report in the Public Sector, the Tribunal cannot ascertain, from the evidence before

it, how the salary which Disputant claimed she was earning in 2016, that is, Rs 26,675- was arrived at.

As regards the salary scale which was actually used by the FPU (provided as salary scale (b) in the contract of Disputant with the FPU (Doc A) and applied in the case of Disputant) this was not merely an alignment with the Chesworth report as explained by one witness for the Disputant. Assistance or reference was also made to what applied in the private sector for part-time workers.

Also, evidence has been adduced on behalf of Disputant that she was not governed by the terms and conditions of successive PRB reports except for the salary. If this is indeed the case, the Tribunal has difficulty to understand how Disputant who was employed as Clerk/Typist (ex facie her contract of employment with Respondent – Doc B) is being considered as a Clerk/Word Processing Operator under the relevant chapter of the PRB report dealing with Private Secondary Schools, for the purposes of salary. Similarly, the 'long service increment' forms part of the terms and conditions in the PRB report (as per the extract in Doc D) and unless one is governed by the terms and conditions of the PRB report, one would not benefit from 'long service increment'. Payment of such a 'long service increment' may be more in line with *animus donandi* than nothing else, the more so that allegedly only one increment was paid (not as per the recommendations of the relevant PRB report).

Also very importantly, the dispute as referred to us seems to proceed on the basis that 'alignment with the PRB report' satisfies the other necessary elements which are "*constance*" and "*fixité dans le montant*". There is no evidence on record that PRB reports are issued at exactly fixed regular intervals. There is also no evidence that any increase in salary for the relevant grade of Clerk/Word Processing Operator, is always fixed. There is no evidence that the way the salary increase is calculated (even if the quantum of increase may change) is fixed every time a PRB report is published. The criteria of "*fixité dans le montant*" necessarily conveys, in our mind, a certain predictability and stability whereby decisions and planning may be made. The Tribunal is not satisfied on a balance of probabilities that these conditions have been met in the present case.

'Alignment with the PRB report' simply cannot be considered as an implied term of the contract of employment of Disputant or as an acquired right of the Disputant. To hold otherwise would mean that same is binding on the two parties, so that, for example, the Disputant would not even have an option or right to reject a salary recommendation emanating from a PRB report unlike public officers who may always refuse to opt for the recommendations of a particular PRB report. This is the more so if, according to the evidence adduced on behalf of Disputant, she is not governed by the terms and conditions of the report other than the relevant salary scale. This will go against basic principles in relation to salary protection where any change in salary (even if an increase) can only be

done with the consent of the worker. Also, the Tribunal notes that salary increases depend on numerous factors including the capacity to pay of an enterprise and, very importantly, internal equity.

The Tribunal, after careful consideration of all the evidence on record, finds that at best there is evidence that for quite some time the Respondent has adjusted the salary of the Disputant whenever there was a new PRB report, but there is not sufficient evidence on record to show on a balance of probabilities that the adjustments in her salary were such that there was an alignment of her salary with the Chesworth report or PRB reports which had become an acquired right of the Disputant or which had become an implied term of her contract of employment. The Tribunal does bear in mind however that the Disputant has been granted regular salary increases and there is no reason why this should not be the case in the future. Subject to the above, and for all the reasons given above, the Tribunal finds that the Disputant has failed to show on a balance of probabilities that an award as per the terms of reference should be granted, and the dispute is set aside.

(SD) Indiren Sivaramen

Acting President

(SD) Greetanand Beelattoo

Member

(SD) Christelle Perrin D'Avrincourt

Member

(SD) Ghianeswar Gokhool

Member

12 February 2024