

Permanent Arbitration Tribunal

AWARD

RN 743

André Chung Chuen Yeung
and
Municipal Council of Port Louis
IPO Ministry of Local Government

Before

Rashid Hossen	-	Ag President
Binnodh Ramburn	-	Member
Masseelamane Goinden	-	Member

The present dispute has been referred for compulsory Arbitration by the Minister responsible for Labour, Industrial Relations and Employment in accordance with **Section 82 (1) (f) of the Industrial Relations Act 1973** as amended.

Mr A. Domingue, of Counsel, appears for the Applicant

Mr Y. Mohamed, S.C. of Counsel, appears for the Respondent.

Mr M.I. Maghooa, Ag. Assistant Parliamentary Counsel, appears for the Ministry.

The point in dispute is:

“Whether the commuted travelling and 100% Duty Free remission on car should be restored to disputant as from 1 July 1993, or otherwise.”

In his Statement of Case, the Applicant avers that:-

1. He is the Accountant of the Council and has held that position since 1989. He initially joined the service as a fully qualified Internal Auditor.
2. (Paragraph 2 is the point in dispute)
3. He is a Fellow of the Chartered and Certified Accountant (FCCA) and joined the service of the Council on 19 February 1980 as a qualified Internal Auditor. His salary scale then stood at 2000 x 100 – 2700 QB 2850 – 3100 and he joined the scale at 2850 plus a personal to holder monthly travel grant of 600 rupees, not normally afforded to new recruits. The travel grant was a privilege then only accorded to the Town Clerk and Heads of Department.
4. Following the Chesworth report he became entitled as from 1 July 1988 to the top salary in the post of Internal Auditor and his travel grant, was maintained. In addition he was paid a monthly commuted travelling and was entitled to a 100% duty free car.
5. In 1989 he was appointed as Accountant and again drew the top salary in the post of Accountant, with the same fringe benefits and conditions of service.
6. By the 1993 PRB report effective as from 1 July 1993 he continued to draw his top salary with his travel grant being maintained but his duty free benefits were reduced to 60% (instead of 100% duty remission) and his monthly commuted travelling was curtailed.
7. The applicant asserts that since 1 July 1993 he has been unfairly and unjustly penalized following the curtailment of his monthly commuted travelling and the reduction of his duty remission benefits from 100% to 60%.

8. In the meantime he has made numerous verbal and written representations to the Responsible Officer of the Council who has supported his claim.
9. In these circumstances, it is respectfully prayed that the Tribunal should award that the applicant's rights both in terms of monthly commuted allowance and 100% duty free remission for the purchase of a car should be restored to him with retrospective effect from 1 July 1993.

In its Statement of Case, the Municipal Council of Port Louis avers that:-

1. Mr André Chung Chuen Yeung joined its service on 19 February 1980 as Internal Auditor.
2. He holds the following qualifications: FCCA.
3. He was appointed Accountant on 24 January 1989.
4. He was entitled to 100% duty free remission as per the Chesworth Report 1988.
5. However the PRB Report 1993: Errors, Omissions and Clarifications – 19 July 1994, recommended that Accountant drawing salary in a scale the maximum of which is not less than Rs 13,600 monthly is entitled to 60% duty free remission.
6. Representation was made to the PRB through the Ministry of Local Government on 24 October 1996 in the context of the review of the Pay and Grading Structures and Conditions of Service for the PRB Report 1998 so that the grade of Accountant could benefit from the 100% duty remission.
7. So far, the PRB has not replied to the representations and again in its report of 1998 the same recommendation was made, i.e. 60% duty remission be given to the Accountant on purchase of a car for official purpose.

8. The Municipal Council supports the application and has no objection that an award be delivered in terms of the dispute subject to the approval of its parent Ministry.

The Ministry of Local Government and Rodrigues (Co-Respondent), in its Statement of Case, avers that:-

1. Mr André Chung Chuen Yeung joined the service with the Municipal Council of Port Louis as Internal Auditor on 19 February 1980.
2. He is a qualified Accountant holding the FCCA.
3. He was appointed Accountant on 24 January 1989 and benefited from 100% duty remission on the purchase of a motorcar. He was paid travel grant and retained the commuted travelling allowance paid to him on a personal basis since January 1982
4. As from 1 July 1993 – following the PRB Report – the grade of Accountant was classified in the list of grade entitled to 60% duty remission on a car. The travel grant was maintained but the commuted travelling was curtailed.
5. Despite representation made to PRB by the Municipal Council of Port Louis no alteration in such conditions was made by the PRB in its Report of 1998.
6. The grade of Accountant exists in the Public Service and on the establishment of other parastatal bodies.
7. Duty free entitlements and eligibility for payment of travel grant and commuted travelling allowance are general conditions of service recommended by PRB and revised from time to time by the Ministry for Civil Service Affairs and Administrative Reforms.

8. The Ministry stands guided by the provisions and what is obtained in the PRB Report 1998.

The Applicant, examined briefly by Mr Domingue, swore to the correctness of his Statement of Case. He further drew the attention of the Tribunal that the monthly commuted allowance which has been curtailed amounted to Rs 2400 per month.

Cross-examined by Mr Maghooa, the applicant conceded that:-

1. The commuted travelling allowance which was granted to him was following a request which was made by him since 1980 before joining the Council.
2. He was given this commuted travelling allowance – which amounted to Rs 520 per month – with effect from January 1982 and subject to funds being available. This was approved as an exceptional case which is not to be taken as a precedent.
3. The duty free benefit to the category of Accountant was reduced to 60% following the PRB Report of 1993.
4. There is an option form which indicates that he has taken cognizance of the PRB report and understands that the acceptance of the revised emoluments constitute acceptance of all the revised terms and conditions of service. He has signed the option form in 1998 and in 2003. He also understands that this option is irrevocable.
5. In the PRB report of 1998 and of 2003 it has been clearly spelt out that he will be entitled to a travel grant and a duty free concession of 60% restored to 70% depending on the salary he is entitled to. No reference is made to commuted travelling allowance.
6. All Accountants in the Local Government Service and in the public service are entitled to salary, travel grant and duty free facility according to the PRB report.

The applicant, re-examined by Mr Domingue, affirmed that:-

1. His employer, the Municipal Council of Port Louis, had supported his request vis-à-vis the PRB. Representation was made by the Council in May 1998. Subsequently after the PRB Report of 2003 further representations were made on his behalf to the PRB (probably in October 2004).
2. A reply was received from the PRB that the duty free remission which was formerly 100% had in 1993 been reduced to 60% and in 2003 it was increased from 60% to 70%. It is still for the time being at 70%.
3. His claim is that the gap between 60% or 70% and 100% ought to be bridged in his case being given that he joined the service of the Municipal Council in exceptional circumstances.
4. The Council has always been supportive of his claim be it in 1998 and 2004 in so far as the question of the quantum of the duty free remission is concerned.
5. In his case, being given the exceptional circumstances he has referred to, his right ought to be restored since he claims that he cannot fall within the generic category of Accountants with the public sector.
6. When he was first enlisted he was given a personal to holder salary and other fringe benefits which other Accountants were not entitled to.
7. He is now moving the Tribunal for an award to him on a personal to holder basis.

Mr Domingue, in his submission, firstly invited the attention of the Tribunal that there is a dispute of interest as opposed to dispute of right between the parties. He refers to **paragraph 105 of the Third Schedule of the Industrial Relations Act**, where the distinction is clearly drawn. It reads as follows:-

“Disputes are broadly of 2 kinds:-

- (a) Dispute of right (i.e. to legal rights) which relates to the application of existing collective agreements or contracts of employment and*
- (b) Dispute of interest (i.e. economic disputes) which relates to claims by employees or proposals by management about terms and conditions of employment.*

He therefore submits that the present dispute falls in the latter category. The disputant has claimed that his commuted travelling and 100% duty free remission on the car should be restored as from 1 July 1993. He had joined the service of the Municipal Council in rather exceptional circumstances since he was paid personal to holder travel grant of Rs 600 and his point of entry was Rs 2850 in a scale of Rs 2000 to Rs 3100 and in 1983 he had reached the top salary. The Chesworth report of 1988 had preserved his commuted travelling and he was entitled to a 100% duty free car. As from 1 July 1993 the duty free remission of 100% was reduced to 60% as a result of the PRB report of 1993.

Counsel for applicant also stated that there is no evidence whether his client opted or not for the PRB report of 1993 but he did opt in 1998 where again the same policy in respect of Accountant was adopted i.e. a 60% of duty free benefit on car. It is Counsel's submission that in view of the exceptional circumstances which had prevailed at the relevant time, commuted travelling and the 100% duty free benefit on car be restored to the applicant as from 1 July 1993. Counsel also drew our attention that the Municipal Council had supported the applicant's case all along. He therefore prayed that an award be given in terms of the disputant's claim.

Mr Mohamed, appearing for the Respondent, submitted as follows:-

1. The Municipality, as far as conditions of employment are concerned, depends very much on the Ministry of Local Government. So the Municipal Council is not autonomous for every contract, for every condition of employment and has to refer back to the Ministry of Local Government.
2. He is not agreeable to the fact that the present dispute is one of interest in contrast with what Mr Domingue had submitted just earlier.
3. There is evidence that when the applicant was cross-examined he agreed to certain new conditions and he did sign an option form in 1998 and in 2003. He cannot therefore stick to the original contract. In this connection Counsel referred to la novation in "**Ripet et Boulanger, traité de Code Civil Second Volume edition 1957.**"
4. To conclude, Mr Mohamed stated that there is clear evidence that we are in presence of a new obligation accepted, a new term of contract accepted by the applicant.

Mr Maghooa, in his submission, conceded as follows:-

1. It is a fact that in 1980 the applicant joined the Municipal Council and was paid salary as per his terms at paragraph 3 but the fundamental point is the letter of 31 March 1982 when it was made clear to the applicant that the Minister has approved as an exceptional case, which is not to be quoted as a precedent that a commuted travelling allowance of Rs 520 per month be paid and this was subject to funds being available. There was a sort of précarité in that allowance which was given to him. This allowance was not firm; it was not only exceptional to him but exceptional and subject to funds available.
2. The Chesworth report allocated by way of benefits to Accountant generally (be it in the Civil Service or in the Local Government or parastatal organization) a 100% duty remission with a commuted travelling allowance which the applicant benefited.

3. In 1993 the PRB report reduced the duty remission to 60% but the PRB report should be considered as a package in itself in terms and conditions. The applicant did not subject himself to the new terms and conditions of service of the PRB report of 1993 but in 1998 and in 2003 he accepted the revised emoluments and terms and conditions of service. This option was irrevocable.
4. In law although the dispute may be construed to be a dispute of interest, there is clearly an estoppel which operates that the applicant cannot come back irrevocably. Having made his option irrevocable, he is estopped from taking whatever point which arose out of his first term of reference.
5. Counsel concurred with Mr Mohamed so far as the law of contract is concerned. By his option, governed by new terms, there is a novation of the contract and the applicant at this stage cannot come on his initial terms and conditions of contract of 1982. As a matter of fact, the PRB turned down representations made on his behalf.
6. Finally the PRB report prevails over whatever claims the applicant contends he is entitled to.

In the reply of Mr Domingue, we gather three points:-

- (a) The applicant was recruited on exceptional circumstances joining the service at Rs 2850 (Q.B.) in the scale of Rs 2000 to Rs 3100 and he was also given on a personal to holder basis a travel grant.
- (b) The Municipal Council in its Statement of Case supported the application of the disputant.
- (c) The Tribunal in its previous ruling of 5 May 2004 considered the new definition of industrial dispute under the **Industrial Relations Act** - and held that in the present matter, it "cannot deprive the applicant's claim from being entertained by the Tribunal despite having signed the Option Form, which in the light of what we have already said, became necessarily a void exercise in the present case".

After going through all the documentary and testimonial evidence adduced, the Tribunal finds that:-

1. The applicant joined the service of the Municipal Council in rather exceptional circumstances as he was paid personal to holder commuted travelling and his point of entry was Rs 2850 in a scale of Rs 2000 to Rs 3100.
2. The employer of the applicant, the Municipal Council of Port Louis, had supported his request vis-à-vis the PRB. Representations were made by the Council on his behalf to the PRB in 1998 and in 2004. However, the PRB turned down these representations.
3. The applicant denies that he has signed the PRB option form of 1993 but admits that he has signed those of 1998 and of 2003. However this Tribunal has been filed with a copy of a letter dated 22 November 2004 from the Senior Chief Executive, Ministry of Civil Service Affairs and Administrative Reforms and addressed to the Permanent Secretary, Ministry of Local Government and Solid Waste Management (Local Government Division) where paragraphs 2 and 3 read as follows:-

Paragraph 2. The Bureau has advised that as Mr W.S.S. Chung Chuen Yeung had opted for salary and the conditions of service in the PRB Report 1993, the travelling allowance lapsed and his eligibility for duty remission was limited to 60% as from 1 July 1993. However Accountants are now eligible for 70% duty remission as from 1 July 2003 in accordance with the PRB Report 2003.

Paragraph 3. It would be appreciated if Mr Chung Chuen Yeung could be informed accordingly."

The Tribunal after considering all the above facts has to come to the following conclusions:-

- (a) The applicant has signed a new contract with his employer, which contract is binding and has to be adhered to. He has been receiving emoluments as per the terms of the PRB report and enjoying all the benefits attached to it – the PRB globally – for years.

- (b) He cannot now come and claim what is favourable to him in his first contract. One cannot have it both ways.
- (c) Awarding in favour of the applicant tantamounts to creating two categories of Accountants in the same sector. Applicant should bear in mind that he is not in the Private Sector where conditions of employment are not the same or is employed on contract for a specific period of time.
- (d) The Municipal Council, by itself, is not authorized to fix conditions of employment; it is bound by the approval of the parent Ministry. The applicant has exercised an option; thus the PRB Report prevails upon all other considerations as far as terms and conditions of employment are concerned.
- (e) The fact that the dispute, if any, may be considered as one of 'interest' as opposed to 'right' does not *per se* assist the applicant in his claim. Indeed, as he persistently invoked that his grievance is based on a 'personal' basis i.e a special privilege granted to him, we fail to see in what way his claim would be in the interest of all employees in his category. It concerns him and him alone.
- (f) A special privilege granted in exceptional circumstances cannot be an acquired right especially after a novated contract has taken place. Indeed, the new term agreed "becomes an implied term of a novated contract." (**Central Water Authority v/s Narainsamy 1989 MR 19**).
- (g) Finally, we need to address the issue raised by Applicant's Counsel that the Applicant has been given the right for his dispute to be entertained by the Tribunal despite his signing of an Option Form. We need go no further than what we have already held in the Ruling delivered on 5 May 2004 regarding the present matter and the reasons advanced as to why we could do so. This certainly has no bearing on the merit of the case itself.

On the whole, the Tribunal views that there is no merit in the disputant's application.

The dispute is accordingly set aside.

(sd)Rashid Hossen
Ag. President

(sd)Binnodh Ramburn
Member

(sd)Masseelamane Goinden
Member

Date: 18 April, 2007

