

PERMANENT ARBITRATION TRIBUNAL**AWARD**

RN 974

Before:

Rashid HOSSEN	-	President
Binnodh RAMBURN	-	Member
Rajendranath SUMPUTH	-	Member

In the matter of:-

Mrs Lee Yeung Chong Ah Yan (Daisy)
and
Air Mauritius Ltd

The present dispute has been referred for 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. Y. Mohamed, Senior Counsel, appears for the Applicant.

Mr. F. Nooraully, of Counsel, appears for the Respondent.

ISSUES TO BE DETERMINED

The points in dispute are:-

- 1. Whether Management's decision to appoint Mrs Lee Yeung Chong Ah Yan in the Management B grade as "Officer in Charge" with effect from 1 February*

2007 instead of October 2000 so as to restore and maintain her seniority vis à vis her junior and less qualified colleagues, does constitute an abuse of power, an unfair and prejudicial treatment, and if so;

2. *Whether her appointment in Management B grade should be backdated to October 2000, or otherwise.*

BACKGROUND

We consider it apposite to reproduce the various Statements of Case of the parties in order to identify the pertinent issues relevant to this arbitration.

Statement of Case of Applicant

1. The employee joined Air Mauritius on the 2nd July 1973 as a full fledged Secretary and was appointed as the Secretary to the Deputy Chairman & Deputy Managing Director of the Company.
2. In 1979, the employee acted as the Secretary to the then Chairman & managing Director, also Founder Chairman, of the Company up to the death of the said then Chairman and Managing Director.
3. Since 1979 the employee holds An Advanced Certificate in Secretarial Studies from the University of Mauritius, in addition to several certificates from international institutions as hereunder set out, viz:

List of certificates

- University of Cambridge – School Certificate
- John Kennedy College – Secretarial Course
- London Chamber of Commerce(LCC) 1970 – Typewriting – Intermediate stage
- LCC (1970) – Book Keeping – Intermediate stage
- LCC (1977) – Shorthand – Speed 80
- LCC (1977) – Typewriting – Higher stage with distinction
- Mauritius College of the Air – Commercial English 1978
- University of Mauritius – Secretarial Studies 1978

- London Chamber of Commerce 1979 – Shorthand – Speed 90 with distinction
 - University of Mauritius – Advanced Certificate in Secretarial Studies 1979
 - IATA –Management Training and Development Programme – May 2000
4. In the year 1981, the employee was appointed, by the Company, as Confidential Secretary to the new Chairman and Managing Director which Office she occupied up to the year 1997.
 5. In 1997, the employee was appointed as Personal Assistant to the Chairman and Managing Director, at Management C level, and on 06 April 2000 the job was retitled “Head of Chairman’s Secretariat”, the Chairman was also the Managing Director.
 6. The employee, has worked with all the three Chairmen & Managing Directors of the Company and as such she has discharged her duties efficiently and effectively.
 7. Thus all Chairmen & Managing Directors, have always insisted that the employee stays in her job. Furthermore the employee has been the Head of the Chairman & Managing Director’s Office for more than 20 years.
 8. In September 2000, Sir Harry Tirvengadam was once again appointed Chairman of the Company. At the insistence of the Chairman, the employee was assigned to manage the Chairman’s office. The employee did not have a say to accept or to refuse.
 9. In September 2000, Mr. Poonosamy was appointed as Managing Director of the Company and in the month of April 2001, Mr. Chidambaram was appointed as Managing Director of the Company.
 10. At that time, the employee was still attached to the Chairman’s Office.

11. In the year 2001, Mr. Chidambaram, the then Managing Director, appointed Mrs. Naz Peersaib, another employee of the Company, as his Personal Assistant and the latter had received a promotion from AM 7 to Management C. Following the last promotion of Mrs Naz Peersaib from AM6 to AM7, representations were received from the other Senior Confidential Secretaries. They were consequently upgraded to AM7. The staff grades are from AM1 to AM7 and Management C to Management A.
12. In September 2003, Mr. Pillay joined the Company as Managing Director. As such he transferred one Miss Marguerite Chan Sing, from the Chairman's Office, to the Managing Director's Office. At that time Mrs Marguerite Chan Sing was also promoted from AM 6 to Management C, i.e. a double graded promotion and furthermore another employee in the name of Mrs Marjorie Barbe also received double-graded promotion.
13. During the Directorship of Mr. Pillay, Mrs Naz Peersaib was promoted in April 2004 to the top level limit of the Management C salary scale and she was further promoted in August 2004 to Management B level with retrospective effect as from April 2004. The job was not advertised contrary to established procedure in Air Mauritius, thus the employee was not given the chance to apply.
14. It is the employee's contention that these accelerated promotions have led to an anomaly in the Company's structure amongst Secretaries.
15. Furthermore, it is the contention of the Employee that her right to promotion has been trampled upon.
16. The employee further avers that all the three Secretaries in the Managing Director's Office do not hold any professional Certificate.
17. The employee also avers that Mrs Naz Peersaib, who does not hold any appropriate certificate, has been promoted to Management B after THREE YEARS in the Managing Director's Office.

18. The employee holds an Advanced Certificate from the University of Mauritius and has been in Management C since the year 1997. The employee has been working with the Chairman and Managing Director for more than 20 years and as such deserves due consideration by the Company.
19. Following representations made to the Employer, on the 14th February 2007, the employer informed the employee that she has been offered the Post of “Officer in charge” in the Chairman’s Office on the Management B Grade, with effect as from 1st February, 2007.
20. The employee then informed the employer that such appointment should in fact have taken effect from October 2000, when she was given additional responsibilities as minuted at Board Meeting of 14th December 2000 and her salary be accordingly adjusted to reflect her seniority.
21. In a letter dated 06 March 2007 received by the employee on 08 March at 15.30 hrs the employee was informed by the employer that the offer is “complete, final and not subject to further negotiation and the deadline to accept the offer was 09 March.
22. Furthermore, the employee was also informed by the employer that should she insist on the issue of backdating of the date on which the proposed appointment shall take effect then the employer shall withdraw its offer.
23. The employee avers that she has not committed any act of misconduct, even of a minor nature, and in relation to her present “status” she perceives it to be a punitive one, a sanction and a demotion. Such punishment and sanction is unlawful and illegal, in breach of her conditions of service, and in breach of all norms of fairness and equity and constitutes a clear abuse of power by the company that has caused her great prejudice. The rules of natural justice have obviously been disregarded.

Allowing such an abuse of power to persist would be grossly unfair and prejudicial to Mrs Daisy Chong Ah Yan in her professional capacity and be permanently damaging to her reputation as a responsible employee and prejudicial her career.

23.1 It is also the employee's contention that her prevailing employment status is a punitive measure against her, when:

23.1.1 She has always acted in the best interests of the Company and in accordance with her duties and responsibilities;

23.1.2 she has never been asked to answer any charges;

23.1.3 she has not been convened before a Board of Discipline by the employer

23.2 the employer has never consulted her prior to their taking decision as to her placement;

23.3 there are no complaints against her;

25. The decision not to accede to her request as per paragraph 20, constitutes an abuse of power.

The Employee therefore humbly prays that an Order be made by the Permanent Arbitration Tribunal to the effect that:

A. The decision of the Company to appoint the employee in the Management B grade as "Officer in Charge" with effect from 1st February 2007 is arbitrary and does constitute an abuse of power, and unfair and prejudicial treatment to and in violation of the legitimate expectations of the employee.

B. The employee appointment in Management Grade B should be backdated to October 2000 or such other date much earlier to 1st February 2007 as is deemed just and fair by the Tribunal.

C. Such other Order/s that is just in the circumstances.

STATEMENT OF CASE OF RESPONDENT

1. Air Mauritius takes note of the averments of Paragraphs 1 to 5 of the statement of Case of Applicant.

2. Air Mauritius takes note of paragraph 6 and avers that Applicant had discharged her duties in line with her contractual obligations in her various capacities during her employment with Respondent.
3. Respondent is not aware of the averments of paragraph 7 and consequently denies same and puts Applicant to the proof thereof. Defendant further avers that Applicant was employed in the following capacities during her employment:-
 - (a) 1 April 1980 to 31 December 1991: Confidential Secretary – Chairman’s office
 - (b) 1 January 92 to 31 March 1996; Chief Confidential Assistant- Chairman’s Office
 - (c) 1 April 1996 to 16 February 1997; Chief Confidential Secretary – Chairman’s Office
 - (d) 17 February 1997 to 31 January 2007; Personal Assistant – Chairman’s Office;
 - (e) 1 February 2007 onwards: Officer in Charge – Chairman’s Office
4. Save and except that Respondent admits that Sir Harry Tirvengadam was appointed as non-executive Chairman of Air Mauritius in September 2000, Respondent denies that Applicant was forced to work with the newly appointed non-executive Chairman and that she had no say in the matter. Respondent avers that Applicant had never intimated, whether in writing or otherwise, that she did not want to work with the newly appointed non-executive Chairman.
5. Respondent avers that in September 2000 the post of Chairman and Managing Director was split into two i.e. from that date onwards there was one Non-Executive Chairman and one Managing Director appointed and Applicant remained attached to the non-executive Chairman after the split.
6. Save and except that Respondent admits that Mrs N. Persaib was appointed as Personal Assistant to the then Managing Director, Mr. V. Chidambaram in 2001, the other averments of paragraph 11 are denied. Respondent avers that the promotion of Mrs N. Persaib was solely based on the operational requirements of

the Managing Director's Office. Respondent further avers that a few Senior Confidential Secretaries were upgraded to the post of Senior Administration Officer on the AM 7 salary scale of the Company in order to create a career path for those secretaries who had 20 years of service in the Company and reckon 7 years as Senior Confidential Secretary. Respondent took also into account that these Senior Confidential Secretaries were working with Senior Officers of the Company and there has been in the course of time a review in their work load and their responsibilities.

7. Save and except that Respondent admits the appointment of Mr M. Pillay as Managing Director in September 2003, Respondent denies the other averments of paragraph 12. Respondent avers that the transfer of Ms M. Chan Sing to the Managing Director's office was because the Chairman being a non-executive Chairman, the work load was such that it did not necessitate two persons to do the day to day work whereas the Managing Director's office was overloaded with work and necessitated additional staffing. The change in the level of both Ms Chan Sing and Mrs Barbe were warranted due to operational requirements which took into account their work load and responsibilities in the Managing Director's Office. Respondent further avers that the working hours in the Managing Director's office are very extensive compared to the working hours which prevailed in the non-executive Chairman's Office. Applicant, for instance, would finish much later than that and usually not earlier than 7 pm.
8. Respondent denies paragraph 13 and avers that promotion of Mrs N. Persaib to Management 'B' scale of the Company was not done contrary to existing procedures since promotion to Management grades does not necessarily have to go through advertisement as opposed to upgrading in the staff grade which is governed under existing Procedural Agreements signed off with respective unions.
9. Respondent avers that Mrs Persaib was promoted as Manager-MD's Office following a redefinition of duties of the Managing Director's Office (now called Chief Executive Officer's Office) and in view of her work load which had increased over the years along with the size of the Company.

10. Respondent denies the averments of paragraph 14 to 17 and avers that the Managing Director's office (now restyled as the CEO's office) does not have three Secretaries but:

1. One Manager-CEO's Office –Mrs N. Persaib
2. One Executive Secretary - Mrs M Chan Sing
3. One Senior Administrative Officer – Mrs M Barbe

Mrs N Persaib holds the following certificates:

- School certificate
- Certificate in Secretarial Practice
- Certificate in Word Processing

Ms M Chan Sing holds the following certificates:

- School Certificate
- Certificate in Typewriting
- Certificate in Book-Keeping
- Certificate in Shorthand Speed
- Certificate in Commercial and Secretarial Practice

Mrs M Barbe holds a School Certificate and was a former Air Hostess.

11. Respondent takes note of paragraph 18 and avers that Applicant has always been given due consideration as evidenced by her successive promotions within Air Mauritius.

12. Respondent takes note of paragraph 19 and avers that the Post of **Officer in Charge** in the Chairman's Office was a new post offered to Applicant with a new scheme of duties taking into account, inter alia, the representations made by Applicant.

13. Respondent denies paragraph 20 and avers that the issue of backdating does not arise as the post to which she was appointed was new one which did not exist within the Company.

14. Respondent takes note of paragraphs 21 and 22.

15. Save and except that Respondent admits that Applicant has not committed any act of misconduct, Respondent denies all the other averments made in paragraphs 23 and 25 and avers that:
- a. Since the appointments of Mrs Naz Peersaib and that of Miss Marguerite Chan Sing and Marjorie Barbe, Applicant did not make any representation whatsoever to the effect that, her right to promotion had been trampled over or any alleged prejudice suffered.
 - b. Those employees who considered that they had suffered prejudice made due representations and even reported industrial disputes unlike the Applicant.
 - c. It was only in January 2006, nearly two years after, that Applicant wrote a letter to the Defendant's Chairman to complain of her personal situation in the company.
 - d. Since in Management's view no prejudice was caused and had been caused by Applicant, Management did not take any action whatsoever.
 - e. Following further representations by the Applicant, Management decided in view of the restructuring of the Chairman's office to offer Applicant a new position at Management "B" grade in the company, which had nothing to do with the previous position of the Applicant.
 - f. Though Applicant accepted this new position reserving her right to negotiate as to the effective date of her upgrading, Management considers that no question of backdating could arise in as much as the position offered to the Applicant was a new one which did not previously exist in the Company.
16. For all the reasons set forth above, Defendant avers that no prejudice has been caused to the Applicant and that the appointment of the Applicant to this new position as from 1st February 2007 did not constitute an abuse of power, or an unfair and prejudicial treatment and moves that the case be set aside.

REPLY TO "STATEMENT OF CASE" OF RESPONDENT BY THE APPLICANT

1. The employee records the express and tacit admission made by the Company in its undated and unsigned statement of reply thereafter referred to as "the Defence" filed on record on the 20th February 2008 before the Tribunal.

2. In reply to paragraph 3 of the defence, the employee avers that the title “Chairman’s Office” was created by the budget center to mean “Chairman & Managing Director’s Office” for all purposes. In any event the employee avers that she has been the in charge of the Chairman and Managing Director’s Office for the 20 years, and this whatever has been the appellation of her title. Furthermore she has been the most senior secretary at any point in time as set out in the said paragraph. The employee maintains the averments contained in paragraph 7 of her Statement of case.
3. As regards paragraph 4 of the Defence, the employee avers that :
 - (a) At the time of the split, the Chairman had insisted that she took charge of his Office as it used to be when he was Chairman and Managing Director.
 - (b) She also spoke to the then newly appointed Managing Director, Mr. Viyay Poonoosamy who informed her that he was bringing in his own Secretary, Mrs Covila Runghen, and that she (the employee) should thus, as before remain in her position as the Chairman’s Secretary.
 - (c) Mr Poonoosamy did **bring in** his own Secretary to the Managing Director’s Office. The Secretary of the Managing Director was **not promoted** in as much as it was a lateral transfer and does not entail automatic promotion.
4. As regards paragraph 5 of the Defence, the employee avers that:
 - (a) the term “non executive” was never used when referring to the Chairman, the more so that the Company Annual Report only refers to the Chairman.
 - (b) the Chairman of the Company is also Chairman of the various Board/Committees, such as:
 - The Air Mauritius Board
 - The Air Mauritius Holdings Ltd
 - The General Affairs and Policy Committee
 - The Senior Officers Remuneration and Selection Committee
 - The Risk Management Steering Committee
 - The Amedee Maingard Foundation

He is also Chairman of the following subsidiary companies:

- The Mauritius Helicopter Ltd
 - The Airmate Ltd
 - Medcor
 - Pointe Cotton Resort Hotel Co. Ltd.
- (c) On the International Level last year, the Chairman was President of the African Airlines (AFRAA) and this year he is a Member of the Board of Governors of the International Air Transport Association (IATA).
- (d) In the light of the above facts, her duties and workload, though the Chairman was as alleged “non-executive”, was not lessened, nor the seniority should be considered as being lowered.
- (e) In any event, in case it has been the Company policy that the Managing Directors Secretary is considered to be the senior most than that of the Chairman’s Secretary, then she should not have been asked by the Company to rotate to the Chairman’s Office. It is the duty of the Company to see to it that the rights of the staff are not jeopardized.
- (f) Throughout her career at the Company since 1973, she has always been the senior most secretary in grade and/or rank over all other secretaries of the Company and this whatever have been their designation. The gross anomaly was caused during the tenure of office of Mr. Chidambaram in his capacity as Managing Director, and then by Mr. Megh Pillay as a result of the promotion granted to her as set out in the employee Statement of Case.

5. As regards paragraph 6 of the Defence, the employee avers that:

- (a) When Mr. Viyay Poonoosamy was appointed as Managing Director(MD) he brought in his own secretary, Mrs Covila Runghen, to the MD’s Office. It was a lateral transfer and she was not promoted as normal practice dictates that an appointment should be preceded by the advertisement and selection of the job.

- (b) When Mr. Vinod Chidambaram was appointed as MD he **brought in** his own Secretary, Mrs Peersaib in the MD's Office. Thus Mrs Covila Runghen, who was already there, had to leave the MD's Office.
- (c) During the tenure of office of Mr. Chidambaram, contrary to normal practice, Mrs Peersaib **was** promoted as Personal Assistant to MD, i.e. from AM7 to Management C. That promotion from AM7 to Management C calls for an advertisement but this was not done thus depriving employees in AM7 of their fundamental right for application. It is the applicant contention case that it means a demotion because her junior, less qualified, is promoted to her level.
- (d) When Mr. Chidambaram left the company, Mr. Megh Pillay was recruited and appointed as MD. Mrs Peersaib REMAINED his secretary. During the tenure of office of Mr. Megh Pillay, Mrs Peersaib was further promoted twice,
- (i) Management C to end of scale;
 - (ii) Management C to Management B
- (e) It is relevant to mention that the previous promotion of Mrs Peersaib from AM6 to AM7 CREATED AN ANOMALY and the following Senior Confidential Secretaries made representations for their upgrading.
- Mrs Genevieve Affoque
 - Mrs Selvom Rengasamy
 - Mrs Anita Canabady
 - Mrs Pierrette Han Hung Pew
 - Ms Jacqueline Etienne
- (f) Internal consultations were then held within the Company. Following this all five secretaries were upgraded.
- (g) The employee denies that “**a few**” Senior Confidential Secretaries at AM6 were upgraded to Senior Administrative Officer at AM7 in order to “create a career path” for these employees, in as much as the company had no choice but to promote and upgrade the alleged “few” who in all were **five** in number.

(h) Following the above promotion mentioned in sub-paragraph (g) above, three Confidential Secretaries made representations. They were:

- Mrs Tico Mauree
- Mrs Covila Runghen
- Miss Marguerite Chan Sing

(i) Management on one hand refused to accede to their request and on the other hand promoted one of the above three i.e Marguerite Chan Sing from AM6 to Management C, i.e. double-graded promotion, this job also was **not** advertised.

(j) Mrs Marjorie Barbe had a multi-graded promotion to AM7. This job also was **not** advertised.

The above irregularities brought about a lot of harm to the secretarial structure of the company, depriving secretaries, at all levels, of their right of promotion, this is confirmed in the Defence reply 15(b) “Those employees who considered that they had suffered prejudice made due representations and even reported industrial disputes....”

(k) The employee therefore maintains the averments contained in paragraph 11 of her Statement of Case.

6. As regards paragraph 7 of the Statement of Reply, the employee, without in any way accepting the averments contained therein, maintains the averments contained in paragraph 12 of her Statement of case and avers that:

(a) She was debarred, through no fault of hers, from being (i) transferred to the MD’s Office or/and (ii) promoted because of the alleged non executive Chairman as mentioned by the Company, thus causing great injustice to the employee.

(b) It is apposite to note that Miss Marguerite Chan Sing was (a) transferred from the non-executive Chairman’s Office to the MD’s Office and (b) promoted.

(c) The employee avers that her title was “Head of Chairman’s Secretariat”, i.e.”Head of Chairman & Managing Director’s Secretariat”, during the period when all the upheaval was taking place in the MD’s Office, her title was changed only as from **February 2007**.

(d) The employee further avers that the split took place in October 2000, date at which new responsibilities were given to the employee (applicant). Seven years after in March 2007 the company refers the employee (applicant) request for upgrading. The SORSC meeting of January 2007, offered the applicant a “new” post at Mgt B with the ultimatum that if the company offer is not accepted same will be withdrawn.

7. As regards paragraph 8 of the Company’s Statement of Reply, the employee (applicant) maintains the averments contained in paragraph 13 of her Statement of case and avers that: she has been deprived of her legal rights, her legitimate expectations and the protection of the principles of natural justice in as much as she would have been attached to the office of the CEO as she had always occupied that position. She was requested to rotate to the office of the Chairman due to:
- Her deep knowledge of the affairs of the company;
 - Important files and agreements;
 - Long experience liaising with Company Directors; and
 - Matters of vital importance to the running of the company.
 - Long and unblemished years of unflinching service to previous Board Directors.

She has been holding this position of senior most confidential secretary since 1973, always been attached to the Chairman and Managing Director’s Office.

8. The Applicant records the averments contained in paragraph 10 of the Statement of reply especially held by Mrs Naz Peersaib.
9. As regards paragraph 12 of the company’s Statement of Reply, the employee (applicant avers that her scheme of duties has not changed since October 2000.
10. As regards paragraph 13 of the Statement of Reply, the employee (applicant maintains the averments contained in paragraph 20 of her Statement of Case.
11. In answer to paragraph 15 of the Statement of Reply, the employee(applicant) avers that:
- (a) The decision to promote Mrs Peersaib to Management B was taken in August 2004 backdated with effect from April 2004 and a company car was allocated to her in December 2004, witnessed by the fact that the company car

registration is December 2004. The employee became aware of the promotion of Mrs Peersaib's to Management B only in 2005 when the employee (applicant) noticed that Mrs Peersaib had the use of a company car.

Thus the employee made the following representations, legitimately expecting that they would be favourably dealt with as in the cases referred to in 5(e) and (i) above.

- In 2005 the employee (applicant) spoke to Mr. Ramachandran, the then Chief Executive Administration and Human Resources on this issue.
- In 2005 the employee(applicant) spoke to Dr. Arjoon Suddhoo, the then Chairman, who undertook to take up the matter at the Senior Officers Remuneration & Selection Committee
On his very first day in office on 02 October 2005, Mr. Sanjay Bhuckory, the present Chairman, was made aware of the matter.
- In January 2006 the employee (applicant) made representation in writing to the Company, followed by reminders in May 2006, and again in January 2007.
- As nothing was happening, in May 2006 the employee (applicant) even copied her letters to the SORSC members who are also Board Members and the decision offering her a post at Management B level clearly establishes a recognition that there has been an abuse of power and injustice in my case and the full repair of that prejudice warrants a backdating of that decision to October 2000.

12. The employee therefore maintains the averments contained in her Statement of Case and joins issue with the Company in its Statement of Reply, and prays in terms of her Statement of Case. The Applicant under examination, affirms to the truth of the contents of her Statement of Case. She has also taken recognizance of the Employer's Statement of Case and has field a reply to that Statement of Case.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Applicant deponed to the effect that:-

- The AM7 is not Management level as the Employer claims because Management level starts at Management C and for promotion to Management C it involves staff at the level of AM 7.
- Following the promotion of Mrs Naz Peersaib from AM 6 to AM 7, representations were received from other Senior Confidential Secretaries and they were consequently upgraded to AM 7.
- Mrs Naz Peersaib was in 2001 promoted as Personal Assistant (Management C level) from AM 7. It was an automatic promotion without it being advertised. This post was created for Mrs Peersaib.
- Applicant stated she was the senior of Mrs Peersaib at all time. She had more experience and more qualifications than Mrs Peersaib.
- She should be judged by the Tribunal on the criteria of fairness and equity. She does not mind in fairness to her that her promotion should be backdated if not to 2000 but to 2001, the year when Mrs Peersaib was promoted as Personal Assistant.
- She was appointed as Personal Assistant (in Management C) to the Chairman and Managing Director on 17 February 1997. The job was restyled as Head of Chairman's Secretary which meant Head of Chairman and Managing Director's Secretariat. Prior to that she was Chief Confidential Secretary.
- She was promoted to Management C without advertisement because nobody was senior to her. The promotion which she got in February 1997 was under the Chairmanship and Managing Directorship of Mr. Nash Mallam Hasham. Sir Harry Tirvengadam was

appointed again as Chairman of Air Mauritius in September 2000 after he left in 1997. He came only as Chairman of the Board without cumulating the functions of Managing Director which went to Mr. Poonoosamy.

- She is not able to say how many aircrafts the Company had in the year 2000 as this is not her concern.
- The work done by the Managing Director's Office is different from the work done in the Chairman's Office. In the Managing Director's Office there are 3 persons doing the work whereas in the Chairman's office she is alone.
- She is not aware if the workload in the Chief Executive's Office (previously Managing Director's Office) is different to that in the Chairman's Office.
- She has worked for the Chairman and Managing Director.
- As far as she knows, Mrs Peersaib has professional certificates but not from an international examining body.
- Presently she is drawing a salary of Rs52,700 as Officer in Charge of the Chairman's Office and a car allowance of Rs18,000.
- She was offered that post in February 2007 and accepted it under protest because she was negotiating the effective date. She was given 24 hours to decide or else the post would have been withdrawn. She had no alternative than to sign and make representations.
- The list of duties in her contract of employment as Officer in Charge of the Chairman's Office is different from the list of duties in her previous contract of employment as Personal Assistant to the Chairman and Managing Director.

- The duties which Mrs Peersaib are doing are those of a Secretary. She (the Applicant) has been doing the job for 20 years prior to her. The circumstances may have been different but still they cannot change the seniority of the person.
- In reply to the Statement of Case of the Respondent, she has answered to all the questions.
- Mrs Peersaib was appointed at Management B level in April 2004, whereas she (the Applicant) was appointed at Management B level in 2007 after representations made and with an offer of 24 hours limit. She had to accept it otherwise the offer would have been withdrawn.

Mr. Sudhir Beeharry-Panray, Manager Human Resources at Air Mauritius confirmed the truth of what had been stated in the Statement's of Reply of the Employer. Furthermore, he testified to the effect that:-

- Prior to September 2000, the position of Chairman of the Board of Directors and Managing Director was held by one and the same person. In September 2000, this position was split into two-the Managing Director taking an office and the Chairman (Non- Executive) taking another office and the Applicant stayed in the Chairman's Office.
- All the day to day responsibilities in terms of Management of the Company and the subsidiaries and everything were shifted to the Office of the Managing Director.
- Initially the Managing Director was Mr.Vijay Poonoosamy who brought in his secretary who was working with him as Director legal affairs. Six of seven months after there was appointment of a new Managing Director namely Mr. Vinod Chidambaram who moved

along with his Secretary, Mrs Naz Peersaib, who stayed with him for nearly 3 years. Mrs Peersaib was attached to Mr. Chidambaram as Personal Assistant.

- When Mr. Chidambaram left, Mr. Pillay took office as Managing Director and Mrs Peersaib stayed with Mr. Pillay. With time Mrs Peersaib was drawing a responsibility allowance over and above her salary as Personal Assistant.
- There was a review of the whole set up of the Managing Director's Office because lots of subsidiaries were created at the level of Air Mauritius. There was a growth in terms of daily activities within the Managing Director's Office.
- New positions were created and Mrs Peersaib was appointed as Manager of the Managing Director's Office. That post was not advertised because not all positions in Management are advertised contrary to promotional posts in staff grade. There is a procedural agreement with the unions to advertise all promotional positions for staff grade. In certain Management positions where people have got the profile and have been doing certain jobs, they are appointed. There was also the appointment of an Executive Secretary to the Managing Director and the appointment of a Senior Administrative Officer in the Unit.
- The Managing Director's Office has now become the Chief Executive's Office and Mrs Peersaib is manager of the Chief Executive's office. Mrs Chan Sing and Mrs Marjorie Barbe are respectively Executive Secretary and Senior Administrative Officer of the Chief Executive's office.
- The position which was offered to the Applicant in 2007 is a different position with different responsibilities from what she was given in her previous Contract of Employment.

- There is no backdating warranted in so far as the Applicant is concerned because this was a new position which was created in 2007.
- There is no dispute regarding the fact that Mrs Chong Ah Yan is senior to Mrs Peersaib.
- He could not say if the Applicant has better qualifications than Mrs Peersaib.
- He agreed that the Applicant has been Head of Chairman Secretariat from 2001 to February 2007 in Management C.
- The position of Chairman of the Board and Managing Director was split in September 2000.
- Management does not put in doubt Applicant's competence.
- The issue of seniority is not the sole criteria on which Management proceeds with the upgrading of incumbents to positions. When it goes to the position held by Mrs Peersaib, she was working with the Managing Director since 2000. She stayed with the Managing Director and was drawing a responsibility allowance over and above her salary. She followed the Managing Director.
- From September 2000, The Managing Director was Mr.Vijay Poonoosamy who has his own Secretary Mrs Covila Runghen. Afterwards there came Mr.Chidambaram who moved along with his Secretary, Mrs Peersaib. Mr. Chidambaram himself suggested that his secretary should move along with him.
- Mrs Peersaib was drawing a responsibility allowance of Rs3,000 since 2001. The Applicant did not have any responsibility allowance.
- There is no agreement with any union that 'not all Management's position are advertised'.

- There are certain situations where people are already culminating certain functions and are eventually appointed.
- The jobs which are advertised are those where the Company does not have the required profile and the Company advertises it.
- The post of Mrs Peersaib was not advertised because she has the necessary profile and was already doing the job. The Applicant did not have the necessary profile for the job.
- The restyling of the Applicant's post in Management C was in April 2000 and the split came in September 2000.
- When there was the split, nobody was promoted on that particular date. Promotion came in 2004 in the context of the review of the whole structure of the Managing Director's Office which subsequently followed with other departments including the Chairman's Office afterwards.
- Mrs Peersaib, Mrs Chan Sing and Mrs Barbe are still employed in the Company and are currently working in the Chief Executive's Office.
- The post which the Applicant is now holding is a new function. It was created in February 2007 and has been evaluated at Management B and was offered to the Applicant in February 2007. If it is backdated there would be many implications. The post is pitched at Management B which means that there are certain benefits and privileges attached to it. There would be budgetary implications in terms of back payment of salary. At Air Mauritius there are many disputes and people complain about different treatment. This particular case may be linked to others.

- Mrs Peersaib has a car given to her when she was promoted to Management B in the year 2004.
- The witness is not aware of the repeated protests of the Applicant prior to the creation of the post that has been offered to her in the year 2007.

COUNSEL'S SUBMISSIONS

Mr.Y. Mohamed, Senior Counsel, submitted:-

Mrs Peersaib, who has not been proved to be more competent than the Applicant has been preferred to get promotion to Management Level B before the Applicant who is her senior and with more qualifications than Mrs Peersaib. The latter has had this privilege for having worked with Mr. Chindambaram. She moved along with him. The Applicant who is as competent as Mrs Peersaib if not more competent than her and has been simply *mise au rancart* for no reason whatsoever. The Company has chosen its policy not to have one person to discharge the position Chairman and Managing Director. The Applicant did that job before of discharging the functions for that one person, Chairman and Managing Director. The structure is then changed but her experience is still as good. The Applicant had to suffer and no explanation has been given. Mrs Chong Ah Yan has given her detailed qualifications in her Statement of Case as opposed to those of Mrs Peersaib. We do not know from which institutions are the certificates of Mrs Peersaib. We are kept in the dark regarding her certificates. Is it not just another instance of favouritism to the detriment of someone deserving? We should not frustrate the ability and capacity of people and should not disturb them in their functions. Favouritism does not encourage efficiency. People will go on suffering if there is favouritism and nepotism. We are going to have a law soon to enable people to go to a Tribunal and question undeserved

mise au rancart of certain people. Looking at the Tribunal's record, there is the case of *Mrs DCP against Sun Casinos*. There is the case regarding fairness and equity, *Biquette against CEB of 1988* and his submission is when chances of promotion are unfairly jeopardized, the Tribunal can award even the creation of a new post. The Tribunal can even award that it should be personal and pensionable salary. It can even award for a certain allowance for the period for which an appointment or promotion was denied. At paragraph B.9 of the case of *Biquette v/s CEB* it has been said that - "we have after careful consideration decided to set aside the claims but in order to ensure that the principles of fairness and equity are upheld, we make the following recommendation:-

Although Mr. Biquette does not possess the required qualifications, the Board should consider allowing him to compete. This would surely meet the ends of justice."

Here his client has the qualifications, better qualifications than Mrs Peersaib.

In the case of *Burrenchobay against PSC*, SCR No 65324, the Supreme Court said that:-

"Her seniority right should have been restored. This was not done and now she is back to square one in the sense that others have been promoted over her head. Her right should be restored. What is to be done is for the Commission to decide but she must have redress." The Applicant must have redress. He refers to the case of Union of Customs and Excise Officers against the Ministry of Finance. It is said that the Tribunal has the power to give various things and the Tribunal did give.

The Applicant's competence is recognized and her qualifications are better. She has done the job for years with the Chairman in those years when the post combined the post of Chairman and Managing Director. She was deserving and was not considered at all. She kept on complaining without results. Finally she was offered the contract of 2007

which she had to accept within 24 hours. She had no choice, she was getting something and something is better than nothing. She had to accept and complain after, otherwise “the offer is withdrawn.”

Counsel cited Section 47 of the Industrial Relations Act as well as Clause 6 to the 2nd Schedule.

He further submitted that the Tribunal is not bound by pleadings. Since Mrs Persaib got her promotion in 2001, we should be able to go back to 2001. The Applicant deserves to have a car long before Mrs Peersaib. She did not get it. This is a case of *passe-droit*.

It has not been proved that her backdating would affect the rights of others. She is the top most person not only in years of service but in that field of the Company, Head of Secretariat. Her rights have been affected. The Supreme Court has in the case of Mrs Burrenchobay said “you have to give her what she deserves, what is due to that person.”

The Supreme Court has done it and the Tribunal can do it in the case of the Applicant.

The choices regarding the restructuring of the enterprise were those of Management and such choices cannot be prejudicial to the rights of the Applicant, a deserving person. Management did not give a chance to the Applicant to do the job that Mrs Peersaib was chosen to do.

The Applicant cannot lose her rights by being made to sign a contract under duress. The evidence of duress has not been rebutted on the other side. Looking at the Case of Government Servants Association v/s Government of Mauritius (RN 346 of 5 October 1996), it was said that the acceptance of the offer of supposedly new posts and the Managements’ threat of withdrawing same, if not accepted, constitutes the creation of a *contract d’adhesion*. *A contract d’adhesion* means take it as a whole or leave it as a

whole. No negotiations are permitted and in such situations the employee's right to declare a dispute because of his acceptance cannot be adversely affected. A dissatisfied officer can ask the Tribunal to correct any abuse of power, unfairness and injustice.

The other side has mentioned *le contract c'est la loi des parties*. But one provision of the Civil Code says: *ca ne peut pas constituer un contrat s'il a eu violence*. In this case there has been duress.

The backdating can be done and ordered by this Tribunal just as the creation of a new post. There has been unfairness and opacity as in the case of Baichoo v/s Air Mauritius Ltd (RN 682 of 28 October 2003) in the appointments. The Tribunal has the power to order corrective measures.

Mr Nooraully submitted to the effect:-

The split of the function of the Managing Director in the year 2000 created two separate offices – the Chairman's Office went one way and the Managing Director's Office went in another way. The Applicant has explained that she was requested to work with the Chairman which she did. In 2004 Mrs Peersaib was appointed to Management 'B' position with the Managing Director's Office. It was only in 2005 that the Applicant talked to the Human Resource Director and she eventually talked to the then Chairman, Mr Arjoon Sudhoo, with written representation only in January 2006. The Applicant in 2006 said that she would have been appointed to Management 'B' position. When Mrs Peersaib was appointed to Management 'C' position (in 2001), the Applicant did nothing. The post of Mrs Peersaib (Manager in the Chief Executive's Office) which is the benchmark in the Applicant's case did not exist in the year 2000. In the year 2000 the

Applicant was in Management 'C'. Now in 2008 she is saying that we should backdate the position given to her in 2007 to year 2000. There is no link in all these posts. Mrs Peersaib holds her post in the Managing Director's Office, whereas the applicant holds her post in the Chairman's Office. The work is not the same. We cannot backdate a post in the Chairman's Office based on the Managing Director's Office. It will end up in a *non-sens*.

The Applicant made a choice and there are consequences to choices. It happened that it was a wrong choice. She has not been able to receive what Mrs Peersaib had received. The Tribunal is called upon to redress the choice she made. In the same way in February 2007, she signed a new contract of employment in Management 'B'. This Tribunal cannot go against the contract which has been signed between the parties. In the case of Shamine Dooboory & Anor and Air Mauritius (RN 723), the Tribunal gave a Ruling where it is clearly specified at page 7 –

“In other words, one has to look from the angle of the contractual relationship existing at the relevant time. It is a question of contract.

La Convention fait la loi des parties et c'est un lien de contract de travail régit par le Labour Act.”

Having entered into an agreement, both parties are therefore bound by the agreement. From the last paragraph of the same page we read –

“We have gone through all the authorities cited to us by Counsel and we find nothing to add except that it is trite law that one cannot go “contre et outre le contenu de l'acte.”

The issue of backdating does not arise. This post was not required in the year 2000. It is a different post. The Tribunal cannot come and say to Air Mauritius “you should have created that post in 2000.”

TRIBUNAL’S FINDINGS

After careful consideration of the testimonial and documentary evidence adduced and the submissions of Counsel, the Tribunal finds that:-

The Applicant joined Air Mauritius on 2 July 1973 as a full fledged Secretary and was appointed as Secretary to the Deputy Chairman & Deputy Managing Director of the Company. In the year 1979 she acted as the Secretary to the then Chairman and Managing Director up to the passing away of the latter.

She was employed in the following capacities:-

- (a) 1 April 1980 to 31 December 1991: Confidential Secretary – Chairman’s Office
- (b) 1 January 1992 to 31 March 1996: Chief Confidential Assistant – Chairman’s Office
- (c) 1 April 1996 to 16 February 1997: Chief Confidential Secretary – Chairman’s Office
- (d) 17 February 1997 to 31 January 2007: Personal Assistant – Chairman’s Office(Management C level)

In April 2000, the above job title was restyled as Head of Chairman’s Secretariat (Doc. C)

- (e) 1 February 2007 onwards: Officer in Charge – Chairman’s Office.

We understand that the post of ‘**Chairman**’ prior to the split of September 2000 meant ‘**Chairman and Managing Director**’. At that time the post was held by one and the same person. It is therefore absolutely clear that the Applicant has worked for more than 20 years in the Chairman and Managing Director’s Office. In September 2000 this post was split into two – the Managing Director took an office and the Chairman took another office.

Mr. Vijay Poonoosamy was appointed as Managing Director and brought in (underlined is ours) his Secretary, Mrs Covita Runghen. Sir Harry Tirvengadum was once again appointed as Chairman in the Company and the Applicant remained in the Chairman's Office. The consequence of the restructure (split) at Management level was that 'junior' officers were preferred to the Applicant who is in the Company since 1973 and has been in the Chairman and Managing Director's Office for more than 20 years. As pointed out above, Mr. Vijay Poonoosamy 'brought in' his secretary and later in April 2001 when a new Managing Director, namely Mr. Chidambaram was appointed, he moved along (underlined is ours) with his Secretary Mrs Peersaib.

The Tribunal does not agree with the submission of Counsel for the Respondent that the Applicant chose to remain in the Chairman's Office. There is no evidence to that effect. The choice was not hers and she had to bear the consequences thereafter. As per Management's policy there was more prospect for promotion in the Managing Director's Office. In fact in the year 2001, Mrs Peersaib obtained an automatic promotion as Personal Assistant (from AM 7 to Management C) to the Managing Director's Office. Moreover, as Personal Assistant, she drew as responsibility allowance of Rs3,000. The Applicant was not having any responsibility allowance.

After Mr. Chidambaram left the Company, Mr. Megh Pillay was appointed as Managing Director in September 2003. Mrs Peersaib remained in the office of the Managing Director. During the Directorship of Mr. Pillay, Mrs Peersaib was promoted to Management B as Manager of the Managing Director's Office in 2004 without giving the applicant an opportunity to compete. She in fact remained at Management C level.

There is no dispute regarding the fact that the Applicant has always been senior to Mrs Peersaib. There is no evidence that the latter was more competent and more qualified than the Applicant.

There is also no evidence that her work load is less than her promoted colleagues(s).

The Applicant was already at Management C level in February 1997. At that time Mrs Peersaib was still in the staff grade. The latter reached Management (Management C) only in 2001 – practically 4 years after the Applicant and was promoted at Management B level in 2004 (after 3 years), whereas the Applicant was promoted to Management B level only in February 2007 having been at Management C for 10 years. This appears to the Tribunal to be a clear case of discrimination is as much as the Applicant is senior to Mrs Peersaib and is not less competent nor less qualified than her. On the contrary, if we look at the educational certificates of these two employees, we find ex-officio those documents that the Applicant appears to have better qualifications. The Respondent confess that the Applicant has not committed any act of misconduct in the course of her employment in the company.

We find there is no substance in support of that. The musical chair of allowing a new secretary to hop in the Managing Director's office each and every time a new Director was installed cannot be detrimental to and affect the rights of others.

There was an attempt by the Respondent to show that Applicant is already earning a thick salary package. The employee cannot be blamed after what has been agreed with the employer.

The fact that the Applicant's colleagues were 'brought in' in the Managing Director's Office or made 'to follow' the Managing Director appears to be a unilateral decision.

Furthermore, other employees received double graded promotion and promotion with retrospective effect. All these constitute in the opinion of the Tribunal as an abuse of power. It is an abuse of power when the Applicant was invited to sign a contract under the circumstances she did. It was submitted that it amounted to a *contrat d'adhésion*. We find in **François Terré “Droit Civil, Les Obligations 7th Edition (Précis Dalloz) P 181, para. 188:**

“Le Contrat d’adhésion

Définition – *A l’époque du code civil, les contractants étaient principalement des particuliers traitant entre eux en cette qualité, et à égalité. Certes, il n’y a jamais eu une égalité absolue, une égalité économique entre parties; on a toujours connu des forts et des faibles, mais la disproportion des forces n’était pas écrasante. A l’époque actuelle, beaucoup de conventions sont conclues entre des professionnels et des particuliers. Or, par suite du développement et de la concentration des entreprises, ces groupements ont acquis une puissance les mettant en mesure d’imposer leur volonté à leurs cocontractants. L’égalité juridique recouvre une inégalité économique. Les modalités de formation des contrats s’en trouvent, bien souvent, profondément affectées. Ainsi, une puissante société ne discutera pas avec un salarié isolé les conditions de son contrat de travail et prétendra lui appliquer un règlement élaboré à l’avance par elle seule. De meme, les clients des grandes entreprises subiront la loi de celles-ci: on ne discute pas avec la S.N.C.F. ou une compagnie d’aviation; on discute peu avec une compagnie d’assurances; les tractations sont réduites au strict minimum, puisque ces companies sont fortes d’un règlement auquel le client se contentera d’adhérer, dès lors qu’il choisit de ne pas s’abstenir.*

Afin de designer cette réalité, on parle, à la suite de Saleilles, de contrat d’adhésion: le contenu du contrat n’est pas le résultat de la libre discussion de deux parties placées sur un pied d’égalité; il a été rédigé à l’avance et ne varietur par l’une des parties qui, plus puissante économiquement ou socialement, le propose à l’adhésion de ses multiples cocontractants.

Si l'on essaie, au-delà des divergences doctrinales, de préciser la notion, trois traits sont généralement relevés:

- *Le contrat d'adhésion suppose entre les deux contractants une inégalité économique et sociale, telle que l'un d'eux est plus ou moins maître des biens ou des services que l'autre peut désirer.*
- *L'offre de contrat est adressée non à une personne déterminée mais au public en générale, ou à une fraction de celui-ci dans les mêmes termes: ce sera la proposition d'un transport pour tous ceux qui veulent utiliser telle ligne de chemin de fer, telle ligne aérienne, tel navire, la proposition d'assurance d'un certain type, ou encore la proposition établie pour les abonnés du gaz ou de l'électricité.*
- *Le contrat est l'oeuvre exclusive d'une des parties. Ayant la responsabilité de la marche de l'entreprise, celle-ci rédige seule les conditions du contrat, lesquelles doivent être semblables pour tous. L'organisation technique complexe de l'entreprise, les conditions générales de son fonctionnement excluent une discussion individuelle entre celle-ci et ses clients.*

Le législateur et la jurisprudence se sont maintes fois émus des abus auxquels ces contrats ont donné lieu. La détection de ces abus, les moyens d'y remédier impliquent la détermination préalable de la nature juridique des contrats d'adhésion."

We further note in “Leçons De Droit Civil Tome II/Premier Volume – Obligations théorie générale, 8^{eme} Edition par François Chabas:-

87 - Imprécision de la classification – *La doctrine classique n'envisage le contrat que comme l'accord auquel sont parvenus deux parties traitant à égalité, de gré à gré. Mais dans la pratique, cette égalité et cette possibilité de libre discussion se rencontrent rarement. De nombreux produits sont vendus à des tarifs imposés par le fabricant; les grands magasins fixent des prix qui ne sauraient être débattus; il est difficile pour un particulier de discuter les conditions d'un contrat d'assurance, impossible pour un ouvrier isolé de faire modifier les conditions de travail imposées par l'entreprise, pour un particulier le prix ou les clauses de transport qu'il conclut avec une compagnie ferroviaire, maritime ou aérienne.*

Frappées de l'opposition entre le contrat de gré à gré et toutes ces situations, certains auteurs ont forgé pour les qualifier un mot qui a fait fortune: le contrat d'adhésion. On a même voulu rapprocher le contrat d'adhésion de l'institution du droit public, en soulignant que la volonté était, d'un côté, absente.

Ce n'est pas tout à fait exact. L'individu garde la possibilité de ne pas contracter, s'il contracte, c'est qu'il le veut; sans doute n'a-t-il pas la faculté de discuter, mais le contrat n'implique pas nécessairement une libre et égale discussion. En effet, l'égalité économique ou psychologique est impossible à réaliser: tel sera pressé d'acheter, alors que l'autre n'aura pas besoin de vendre; le plus fort, ou le plus rusé, triomphera nécessairement. Le passage est insensible du contrat de gré à gré au contrat d'adhésion, et toute classification apparaît délicate.

88 - Intérêt de la classification _ L'équilibre qui existe entre les situations des futures contractants, dispense le législateur d'intervenir dans la formation du contrat de gré à gré. Quant aux tribunaux, ils n'ont qu'à déceler la volonté commune des parties.

Lorsqu'il s'agit des contrats d'adhésion, l'intervention du législateur est, au contraire, nécessaire, au moins quand, par un monopole de fait ou de droit, le contractant qui dicte sa volonté, ne trouve plus de frein dans la loi de la libre concurrence. Le législateur doit alors briser les ententes ou trusts dangereux pour les consommateurs, fixer impérativement les conditions des contrats, les tarifs. C'est ainsi qu'il a interdit ou atténué les clauses de non-responsabilité dans le transport, réglementé impérativement le contrat d'assurance, l'équilibre est alors rétabli dans le contrat par la suppression ou la diminution de l'une et l'autre volonté.

L'interprétation que les tribunaux donnent du contrat d'adhésion est, par la force des choses, très particulière. Il n'est pas possible d'interpréter une volonté commune, puisque cette volonté n'existe pas. L'action de la jurisprudence s'exerce en suppléant dans le contrat des clauses qui n'auraient pas été acceptées par le plus fort, mais qui protègent le plus faible; on peut citer l'obligation de sécurité que les tribunaux <<découvrent>> dans de nombreux contrats d'adhésion.

125 - Restrictions lors de la formation du contrat – Il suffit de rappeler les dispositions impératives qui imposent les cadres de certains contrats. Le contrat de travail est, dans toutes ses dispositions, soumis aux conditions définies par les conventions collectives et par le législateur. La détermination des loyers,

celle des charges des locataires, la durée minimale des baux sont impérativement fixées et changent au gré des majorités politiques. L'ordonnance du 17 octobre 1945 a établi un <<Statut juridique du fermage>>. Ainsi le contrat, dans lequel les clauses laissées à l'initiative des parties sont de moins en moins nombreuses, devant un statut, un contrat-règlement. Mais une transaction entre cette formule autoritaire et celle de la pure et simple autonomie de la volonté est obtenue lorsque le législateur se borne à lutter contre les <<clauses abusive>> des contrats d'adhésion, par exemple en les réputant non écrites. A l'inverse, les textes nouveaux sur la protection du consommateur prescrivent souvent l'insertion de clauses non seulement dans un dessein de formalisme ou d'information, mais avec l'intention d'imposer des obligations nouvelles ou professionnel.

La jurisprudence a parfois introduit de force dans le contrat – notamment dans les contrats d'adhésion, afin de rétablir l'égalité entre les contractants, des obligations qui n'étaient pas voulues par les parties. On assiste à un <<forcement>> du contrat par le juge. C'est ainsi que, dans beaucoup de contrats, par exemple le transport de personnes, la jurisprudence impose une obligation de sécurité à la charge de l'une des parties."

Further more in contrats d'adhésion **DROIT CIVIL –Deuxième année par Yvaine Buffelan-Ianore** the author writes:-

"Il s'agit quand même de contrats, car l'intéressé reste libre de ne pas contacter s'il ne veut pas accepter les conditions qui lui sont proposées. Mais le législateur et la jurisprudence se réservent le droit de contrôler ces contrats et de les interpréter à l'avantage du plus faible." (See also, **V. Jeetoo V. The MTC & OS SCJ 216 of 2007**).

We do not find Applicant's contract dated 6th March 2007 to fall squarely within the ambit of a *contrat d'adhésion*. It was personal to her although it was not an agreement following negotiation. But what strikes us is the unreasonable delay allowed to her to commit herself. It is not denied that she received the contract on 8th of March 08 and the

delay was to expire the following day. Firstly it shows that Management felt it had to attend to the Applicant's complaint which it recognized and made good except for the backdating of it. Secondly, it also shows Management unreasonable move in allowing such a short delay to sign the contract, a move that does not meet the principles of good industrial relations. Counsel for the Respondent stressed on the fact that Applicant signed the contract. True it is that one cannot go "*contre et outre le contenu de l'acte.*" But each case has to be decided on its own facts. A unilateral decision taken and delivered under the Damoclés sword is uninspiring of good human relations attitude on behalf of the employer.

Irrespective of the specificity of the workload that each office requires and the fact that promotion to Management grades does not necessarily have to go through advertisement as opposed to upgrading in the staff grade which is governed under the existing Procedural Agreements, the Applicant should have been given the opportunity to compete for the post the more so as promotion to Management 'B' scale cannot be looked as a low step in the ladder of hierarchy.

We have given ample thought on the contention of Counsel for the Respondent to the effect that backdating a newly created post would lead to a *non sens*. This very creation of the post is Management's doing and we have not been favoured with any legal reasoning to show that it cannot be amended. Apart from the Statement of Respondent's witness to the effect that backdating the appointment will lead to many implications, there has been nothing in substance for us to peg on. We refer here to part of the proceedings in relations to this issue:

TRIBUNAL: You mentioned during cross-examination that the post now of the applicant, the post that she holds cannot be backdated, can you explain to us, what you mean by that?

MR BEEHARRY-PANRAY: What I said is that, this is a new position within the structure. So the new set of function, the post has been evaluated on Management B, it has been offered to Mrs Daisy in February or March 2007. So, when we are talking of backdating of a position, we did not have that position and it was not scale on Management B at that time. So, obviously it is in February 2007 when the post was created then it was offered to her, it was altogether a new position with a new set of function accountabilities which were outlined in the company.

TRIBUNAL: What about backdating the creation of the post, if I may put it that way, is it something that is possible?

MR BEEHARRY-PANRAY: I mean if she is backdating then as I said is that we have got lots of implications with the new positions. But that new position, first, it is pitched on a Management B level which mean at the end of the day there are certain privileges which are associated with that position. One of these privileges is insurance of a car, for example, for 2001 for a Management B position, one would have been entitled to a company car and this policy has been reviewed in 2004/2005. I think it's 2005 we no longer grant personal car to staff, so they are entitled to a car allowance which is to be the tune of Rs18,000, which actually she is drawing. So, which mean that is we are going to backdate to that position then it has to be backdated with all the benefits and privileges which are attached to that position? But for Management it was a new position in 2007.

TRIBUNAL: You said implications, okay, privileges attached to the post?

MR BEEHARRY-PANRAY: Yes.

TRIBUNAL: What are all the implications in backdating the creation of a post? This post was created some time?

MR BEEHARRY-PANRAY: It was created in 2007.

TRIBUNAL: If it has to be backdated its creation apart from allowing the privileges that were attached to the post, will be backdated, what are the implications that it has to the...

MR NOORAULLY: budgetary

MR BEEHARRY-PANRAY: In term of backdating of back payment, in term of salary.....

TRIBUNAL: And to what extent does it affect the right of others?

MR. MOHAMED, S.C: It doesn't, how can it?

MR BEEHARRY-PANRAY:The rights of others no....

TRIBUNAL: In this particular case.

MR BEEHARRY-PANRAY: In this particular case I mean we are used at Air Mauritius to have lots of disputes when we do it this way then we got lots of people complaining that, why in their case this hasn't been done, why in other cases this hasn't been done?

TRIBUNAL: Are you saying that it may be linked to others?

MR BEEHARRY-PANRAY: It may, yes.

TRIBUNAL: Thank you very much.”

We understand when the Applicant expressed her dissatisfaction to the effect that she had no alternative than to comply and complain afterwards.

An unfair and prejudicial treatment was given to the Applicant when we accept as a fact that:

- (a) her seniority has not been questioned.
- (b) she is more qualified than her colleagues when we take into consideration her certificates from recognized institutions(local and abroad).
- (c) she is not less competent than her colleagues.
- (d) there is no case of misconduct leveled against her.
- (e) there has not been equality of opportunity in respect of posting and appointment.

The Tribunal therefore views that there should be redress in the Applicant's case. She is a deserving employee in the light of the evidence we have before us. She has been left in the lurch to the benefit of her colleagues. The Tribunal considers it will fail in its duty if it does not determine in favour of the Applicant simply and purely in the name of equity and fairness. She cannot be made to suffer unduly owing to the policy of the Employer. This Tribunal is not here to award damages, it must only see how, by using whatever wisdom and experience it may have, an employee who has had every reason of feeling frustrated, who, in this case, even had to put up a very courageous but trying and tiring battle, may relinquish his frustration, feel safe and relaxed in his employment, recover his dignity and at the same time recover also even if it is only part of what could have been payable to him over a certain period, had his case been given a consideration similar to that given to others. (See **Award of Mootosamy & Bank of Baroda, RN 155 of 1984**). Also in **D. Goburdhun & Irrigation Authority (RN 483 of 1998 PAT Award)**, the Tribunal held "that, subject to an abuse of powers on the part of Management (**Mrs D.C.Y.P. and Sun Casinos RN 202 1988**), matters regarding appointment and promotion of employees are essentially within the province of management. (**M. Pottier and Ireland Blyth Ltd RN 279 of 1994, A. Ayrga and Tea Board RN 575 of 1998**)."

AWARD

In the light of all the above evidence, including the submissions of Counsel, the Tribunal concludes in favour of the Applicant. Her rights have been trampled upon and the Tribunal has no alternative than to order redress. The Tribunal awards in terms of the Terms of Reference in respect of point No 1 of the dispute:-

"Management's decision to appoint Mrs Lee Yeung Chong Ah Yen in the Management B grade as 'Officer in Charge' with effect from 1 February 2007 instead of October 2000 so

as to restore and maintain her seniority vis à vis her junior and less qualified colleagues, does constitute an abuse of power, an unfair and prejudicial treatment.”

In respect of point No 2 of the dispute, in order to restore normality and maintain her seniority, the Tribunal awards that the Applicant should be appointed in Management B as from April 2004, i.e. the same date that Mrs Naz Peersaib was appointed as such.

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Rashid HOSSEN

President

.....

Binnodh RAMBURN

Member

.....

Rajendranath SUMPETH

Member

Date: 12th November, 2008

