



TRINIDAD AND TOBAGO:
SPECIAL TRIBUNAL 6 of 2009

IN THE INDUSTRIAL COURT

BETWEEN

ESTATE POLICE ASSOCIATION - PARTY NO. 1

And

NATIONAL MAINTENANCE TRAINING AND
SECURITY COMPANY LIMITED - PARTY NO. 2

CORAM:

H. H. Mr. V. E. Ashby	-	Chairman
H. H. Mrs. Judy Rajkumar-Gualbance	-	Member
H. H. Mr. L. Achong	-	Member

APPEARANCES:

Mr. Curtis Robertson)
First Vice President) - for Party No. 1

Mr. B. Wilson)
Industrial Relations Consultant) - for Party No. 2

DATE: February 18, 2011

JUDGMENT

Delivered by Her Honour Mrs. Judy Rajkumar-Gualbance

This is a dispute between the Estate Police Association ("EPA") and the National Maintenance Training and Security Company Limited ("NMTS") which concerns *"the failure of the company to pay outstanding COLA monies to Estate Sergeant Carl Lowe effective February 28, 2002."*

BACKGROUND

Estate Sergeant Carl Lowe ("*Officer Lowe*") was employed with the NMTS ("*the Company*") with effect from March 16, 1989 until his retirement in May 2005. He was paid fortnightly, a salary of \$1,119.20 and he claimed that he received a Cost of Living Allowance ("*COLA*") in the amount of \$110.40.

On January 1, 1994, NMTS (the Company) discontinued the payment of COLA to *all* its security personnel, a decision which later resulted in a dispute concerning the payment of COLA to the Company's '*red circle*' security officers. This "*COLA dispute*" was eventually referred to the Industrial Court (the Court) on August 17, 2001 as ST 7 of 2001. EPA and NMTS ("*the Parties*") subsequently executed a Memorandum of Agreement (MOA) thereby settling and disposing of the dispute. The terms of settlement (TOS) in the MOA dated February 26, 2003 are as follows:

1. *"Monthly Cost of Living Allowance (C.O.L.A.) of Four Hundred and Forty One Dollars and Ninety nine cents (\$441.99) is to be consolidated onto the Salary Rate for the Senior Security Officer and Security Supervisor job classes effective 2002 November 01.*
2. *As of 2002 Ncvember 01, the eligibility of all Security Personnel to C.O.L.A. would cease.*
3. *The Company shall pay to the eligible Security Personnel as per the attached listing, all monies owed to them as C.O.L.A. ARREARS, effective FRIDAY FEBRUARY 28, 2003.* (Our emphasis)

The '*attached listing*' referred to at (3) above, provided the names of five hundred and fifteen security personnel who were eligible to receive "*COLA Backpay*" for the period January 1, 1994 to October 31, 2002. The eligible officers were identified as those permanently hired by the Company before March 16, 1989 and who were termed '*red circle*' security officers. This '*red circle*' term is found in the Parties' first three-year Agreement¹ and reads:

"Article 28 – Red Circle Positions:

Notwithstanding the above, Security Officers hired prior to 1989 March 16, who currently enjoy superior conditions of employment than (sic) those included in this agreement shall continue to enjoy such terms and conditions." (Our emphasis)

In a subsequent Agreement² the '*red circle*' clause remained basically unchanged and reads:

"Article 31 – Red Circle Positions

Notwithstanding the above Security Officers hired prior to 1989 March 16 and who retained Red Circle Status and enjoy superior conditions of employment than (sic) those included in this agreement shall continue to enjoy such terms and conditions." (Our emphasis)

The MOA brought an end to the COLA dispute between the Parties providing for, inter alia, COLA arrears to be paid to all the

¹Agreement between the EPA and the NMTS - November 1, 1995 to October 31, 1998; signed on November 10, 1995.

² Agreement between the EPA and the NMTS - November 1, 2001 to October 31, 2004; signed May 22, 2003.

Company's 'red circle' security officers for the period January 1, 1994 to October 31, 2002, with effect from February 28, 2003.

THE EPA'S CASE

Estate Sergeant Carl Lowe, whose witness statement was tendered into evidence, was the sole witness for the EPA.

In his evidence-in-chief he disclosed that he worked with NMTS for seventeen years as a security officer and retired from their employ in May 2005. He recalled that when he was hired by the Company on March 16, 1989, he received COLA fortnightly in the amount of \$110.40. To support this claim, he made reference to a job letter which he received from the Company in June 1992. Tendered into evidence, the job letter, dated June 3, 1992 reads:

LETTER I

"1992 June 03

To whom it may concern

Dear Sir

This is to certify that Carl Lowe has been employed with the above named Company since 1989 March 16.

His position is that of SENIOR SECURITY OFFICER. In this capacity, he earns a fortnightly salary of One Thousand One Hundred and Nineteen Dollars and twenty cents (\$1,119.20) and a cost of Living Allowance of One Hundred and Ten Dollars and Forty Cents (\$110.40). (Our emphasis)

Mr. Lowe is presently assigned to the Port of Spain General Hospital facility.

Yours faithfully

***Sgn: Enrique Eligon
PERSONNEL MANAGER (AG)"***

In his viva voce evidence he also recalled that COLA was subsequently removed from his **"fortnightly income"** in January 1994 and that COLA arrears were paid in **"February 2002"** to the **"Security Staff"** of the Company. He also recalled that when he first enquired about his COLA arrears he was told by the Human Resource (HR) Manager, Mr. Michael Hunte, that he would receive his arrears of COLA since **"a cheque was made but they had some things they were checking on....."** When it was not forthcoming he raised the issue again, but was then informed that he was **"not entitled to cost of living allowance"** since COLA was never part of his fortnightly earnings.

Under cross-examination, he affirmed that he signed two contracts of employment at NMTS and insisted that he received COLA when he began working in 1989 and sometime in 1990, but **"after the Coup there was a change of Government"** and COLA was discontinued. He was uncertain whether he was paid COLA in 1991.

Under further cross-examination, Officer Lowe maintained that he obtained **"a taxable allowance"**. Unable to specify the allowance, he tersely commented that **"I didn't use to do my tax ..."** He was then presented with his **"TD 4 slips"** for income years 1991, 1992, 1993 and 1994 and when cross-examined about **"Item 6 - Taxable Allowance"** in each TD 4 slip, none of which reflected payment of COLA to him, the Officer responded quite abruptly saying, **"I don't know anything about that."**

He denied that the information on the job letter was erroneous since the information reproduced on the job letter came from **"his file"**. Although he acknowledged that his first contract of employment did not explicitly state that he would receive COLA as part of his salary, he maintained that the Company denied him the payment of COLA arrears which other security officers received.

He claimed that he had no knowledge of the term 'red circle' and said:

"I was never informed about ... 'red circle'. I only heard about that when this query came up about the cost of living."

Under further cross-examination, the aggrieved Officer averred that he worked with the National Hospital Management Company at the Port-of Spain General Hospital (Hospital) prior to his employment with NMTS and that NMTS took over the security and maintenance contract at the Hospital sometime before March 16, 1989. Although he had no documentary evidence to support his claim, he insisted that he began working with NMTS before March 16, 1989.

THE COMPANY'S CASE

In their bid to commence their case, the Company, without prior notice, made a request to call the EPA's representative, Mr. Robertson as its first witness. However, the Special Tribunal (Tribunal) declined to accommodate the request. The Company then called on Mr. Michael Hunte (Mr. Hunte) the Divisional Manager, Training and Human Resources at NMTS, their sole witness.

Having affirmed the contents of his witness statement, Mr. Hunte testified that as Divisional Manager he conducts negotiations between the EPA (the Association) and the Company and leads the Company's negotiation team. He acknowledged that he led the Company's negotiation team in the 'COLA issue', which he recalled, took some five years to resolve. In his viva voce evidence he explained that:

"During the negotiation, it was agreed by Parties that the Company will provide a list of all the affected workers. This list would then be reviewed by both

Parties. The EPA had the option to include names that they were of the view had not been included by the Company. They would have done same. Some of those names on second review were discarded, some were accepted and the final list was prepared and signed off by Parties."

He testified that a MOA was agreed to and signed by both Parties on the 'COLA issue'. Along with the MOA was a list of names of security officers employed by NMTS who were entitled to receive retroactive COLA payment. He also recalled that at the time of the COLA negotiations the chief negotiator for the Association was Mr. Robertson.

When Mr. Hunte was asked to explain the outcome of the said MOA he responded:

"....the effect was that the red circled term COLA, effective 1st November, 2002... was no longer extended to any security personnel in NMTS."

He also explained *Article 28 (Red Circle Positions)* of the Parties' first three-year Agreement and said that:

"The effective date of 16th March 1989, marked the beginning in NMTS whereby security personnel were divided into two groups...." (Our emphasis)

This he explained meant that security officers employed by the Company before March 16, 1989, and who were in receipt of COLA, continued to enjoy that benefit, while those employed on March 16, 1989 and onward, never received COLA benefits.

He further testified that the MOA that was signed by the Parties on February 26, 2003 effectively brought to an end COLA benefits to all 'red circle' security officers of the Company. Mr. Hunte averred that Officer Lowe was "never red circled because he was employed by the Company on March 16, 1989..." and as such, was never eligible for COLA.

The Company's witness offered an explanation as to why Officer Lowe's job letter (Refer: LETTER I) stated that he (Officer Lowe) was in receipt of COLA although he was not entitled to that benefit.

He explained:

"....The letter that was prepared apparently shows the category of employee.... as a Senior Officer, he got a letter for the category of employee that he was not. He was not a red circled officer....he was not in receipt of COLA."

He further testified that when the aggrieved Officer raised the issue of COLA, the Company examined the pay records and provided Officer Lowe and the EPA with the relevant information, that is, that Officer Lowe was not entitled to receive COLA at any point in time during his employment with the Company.

Under cross-examination the witness detailed the Company's procedure for processing a job letter. He explained that a Company's clerk would first look for the requesting officer's name and rank. A standard letter would be obtained detailing the respective job category and rate of pay for the officer. The clerk would then input the requesting officer's name and number on the job letter which would then be forwarded for an

"authorizing signature" before the job letter is issued to the requesting officer.

Under further cross-examination he stated that:

"...if the job category is....Senior Security Supervisor, there are job letters already prepared with the particular information.... Therefore, once the name and number of the employee is plugged in, the relevant information, for example, fortnightly salary and allowances are already on the template stored in the computer. The only information added is the name, the number and the location of the employee. "

The witness noted though that the computerized system he spoke of was *"not in place"* at the time in question, but added that in the past the job letter was typed following a *"set format"*. He also suggested that in the case of Officer Lowe, the secretary/clerk typist who had prepared his job letter may not *"...have discerned the difference between red circled senior officers and a normal senior officer."* He insisted that the job letter received by Officer Lowe was incorrect in its representation of his earnings as a senior security officer.

Under further cross examination, he denied that he promised the aggrieved Officer that he would receive a cheque in relation to the payment of COLA arrears. However, he acknowledged that Officer Lowe was a permanent security officer with the Company, hired on March 16, 1989, but not entitled to receive COLA.

ISSUES ADDRESSED

Having heard the evidence of both Parties, the Tribunal found it pertinent to deliberate on the following issues in determination of the dispute.

(1) The Issue of Res Judicata³

The Special Tribunal raised the issue of res judicata with specific reference to ST 7 of 2001, which was a dispute between the same Parties and which was referred to the Court in August 2001. ST 7 of 2001 was eventually settled bilaterally, bringing into being a MOA dated February 26, 2003. The TOS in the MOA included an **"attached list"** of names of five hundred and fifteen security personnel who were owed **"COLA Backpay"** by the Company for the period January 1, 1994 to October 31, 2002. These named security personnel were all **'red circle'** security officers of NMTS who previously received COLA as part of their salary up until January 1, 1994. The instant dispute raises the same 'COLA issue' as ST 7 of 2001, but with specific reference to Officer Lowe who claimed that the Company failed to pay him **"outstanding COLA monies"**.

The Tribunal requested submissions from the Parties since we were of the view that the resolution of ST 7 of 2001 brought closure to the 'COLA issue' being raised in the instant dispute and as such, prevents either Party from reopening or challenging the said 'COLA issue'.

In response to the issue of res judicata, the Association acknowledged that the matter was closed but submitted that the dispute be reopened since other security officers, including Officer Lowe were inadvertently omitted from **'the attached listing'** to the MOA. They insisted that the aggrieved Officer was in receipt of COLA and in light of the principles and practice of good industrial relations, they remained intent on pursuing the matter, despite the existence of the MOA.

In response to the Association's submissions, the Company contended that the matter brought before the Tribunal was **"clearly an abuse of**

³ **"Res judicata"** [Latin: a matter that has been decided]. The principle that when a matter has been finally adjudicated it may not be reopened or challenged by the original parties It is known as action estoppel... Oxford Dictionary of Law: 5th Edition; Oxford University Press

process and....without merit.” They further argued that according to the Unresolved Certificate dated January 14, 2008, “... on February 28, 2002, there was no dispute between the Parties” and that “.... the Company is clear in its mind that the matter concerning COLA as it related to its security officers was a settled matter”.

The Company also argued that they were extremely meticulous at ensuring that the list of eligible security officers who were to receive the said COLA arrears in February 2003 was accurate, a process which took some four to five years to complete. They also submitted that the Association was afforded a fair opportunity to verify the names of all eligible security officers.

Having heard the submissions of the Parties, the Tribunal was of the view that Section 10 of the Industrial Relations Act, Chapter 88:01 (the IRA) would have been broad enough to allow the dispute to be heard, despite the constraints of *res judicata*.

The Tribunal was further fortified in its view by the obiter dictum of the Court in its ruling in TD 141 of 1990 between the University and Affiliated Workers' Union and the University of the West Indies⁴, where the Court said on page 14 of its judgment that:

“For a submission that the doctrine of *res judicata* is applicable it must be shown that the issues in the two cases are identical.”

⁴ TD 141 of 1990 between the University and Affiliated Workers' Union and the University of the West Indies; Delivered: August 2, 1994.

The Court went on to say on page 15 of the said judgment that:

"... this Court is enjoined to consider it having regard to all the circumstance of the case and acting pursuant to S 10(3)(b) Chap 88:01.... "act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and the practices of good industrial relations." It is for this reason that this Court by S 17 of the Act "... shall expeditiously hear, inquire into and investigate every dispute and all matters affecting the merits of such dispute before it..."

Therefore, in keeping with the inherent powers of the Tribunal and in affording the Association a fair opportunity to present their case, the Tribunal directed their concerns to the Association on those pertinent issues which it held had to be addressed. Foremost for the Association to prove was whether Officer Lowe in fact received COLA and the other was to determine whether he was entitled or eligible to receive COLA.

(2) Evidence of the Association

(i) Officer Lowe's Testimony

Officer Lowe testified that he received COLA when he was initially hired by the Company but could not provide accurate details on when he received it or when the Company discontinued the payment of COLA. He insisted in his vague recollection of the issue that COLA was paid to him and payments were discontinued "*sometime after the Coup*".

The Tribunal noted the absence of documentary evidence other than the job letter to substantiate Officer Lowe's claim that he received COLA. The Tribunal also noted Officer Lowe's viva voce evidence regarding his inability to produce any of the pay slips he would have received from the Company to prove that he received COLA along with his fortnightly salary.

It was passing strange that he only kept in his possession one piece of correspondence, a job letter from the Company he received in 1992, but kept no pay records. We also noted the Company's submissions when they stated that ***"an employee who believes that he is in receipt of the document that says he is entitled to a payment would have kept that document so safe that it could have surfaced eight years after in 2009 and not keep a single other piece of documented information, a payslip, a TD 4 form, anything that would support his claim."***

Even if we were to give the aggrieved Officer the benefit of the doubt and excuse his inability to accurately recall specific details due to the inordinate passage of time, we noted his testimony regarding his TD 4 Forms and his explanation as to why there were no records of taxable allowances paid to him for the income years of 1991, 1992, 1993 and 1994. Moreover, his vague recollection about his salary particulars certainly questions the credibility of his evidence.

In the light of the paucity of evidence, the Association was unable to convince the Tribunal that the aggrieved Officer received COLA as part of his earnings while employed with the Company.

(ii) The Job Letter

The Association contends that the aggrieved Officer was in receipt of COLA in the amount of \$110.00 ***"as part of his compensation package."*** To support this claim, the Association tendered a job letter (Refer: LETTER I) received by Officer Lowe sometime in June 1992. According to the contents of the job letter, Officer Lowe ***"...earned a fortnightly salary of One Thousand, One hundred and nineteen dollars and twenty cents (\$1,119.20) and a Cost of Living Allowance of One hundred and Ten dollars and Forty cents (\$110.40)."***

The Association also contends that the job letter was an "**official document**" which aptly reproduces the Company's record of the basic terms and conditions of Officer Lowe. They argued that if any employee of the Company requested such a document, the Company's records regarding the employee's terms and conditions of employment would have been sought and would have been appropriately and accurately transcribed on the job letter.

However, the Company, in defending their position maintained that the job letter prepared for the aggrieved Officer was done "**in error**". Mr. Hunte, the Company's witness gave an explanation regarding the error that might have occurred. He stated that the basic terms and conditions of employment of each employee in particular, the security officers are classified according to their respective ranks/categories, while the category of senior security officer is further subdivided into "**red circle**" and "**non red circle**" security officers. He explained that when the standard format or "**form letter**" was used for the preparation of Officer Lowe's job letter, it was possible that the Company's clerk/secretary used a "**form letter**" that was applicable to a '**red circle**' senior officer who would have been in receipt of COLA, as against a '**non red circle**' senior security officer, such as Officer Lowe.

The Company argued that given his very date of employment of March 16, 1989, Officer Lowe was not a '**red circle**' security officer and as such was not entitled to receive COLA along with his salary.

(iii) The TD 4 Slips/Forms

Neither the Association nor the Company was able to bring copies of Officer Lowe's pay slips. The Company, however, presented the **Return of Emoluments Paid and Paye Deducted** (TD 4 Forms) for income years 1991, 1992, 1993 and 1994. These forms are records of the

Officer's annual remuneration for the respective years, required by the revenue laws of the country,

The Tribunal noted that there is no record on *Item No. 6* of any of the four TD 4 Forms that is, the section on the form which records the receipt of taxable allowances such as COLA. This evidence supported the Company's claim that COLA (a taxable allowance) was not paid to Officer Lowe for those four income years.

With specific reference to income year 1992, there is no record on the 1992 TD 4 Form that indicates that COLA was received during that income year. Therefore, the evidence does not support Officer Lowe's contention that he received COLA during the income year 1992 as stated in his job letter. In fact, the Tribunal is of the view that the evidence strongly supports the Company's contention that the job letter issued to the aggrieved Officer in June 1992 was inaccurate in its representation of his earnings.

(iv) The Contracts of Employment

The Company also tendered into evidence, two contracts of employment of Officer Lowe. The Tribunal reviewed the contracts of employment which expressly outline his terms and conditions of employment.

Officer Lowe gave signature to his first written contract of employment on April 12, 1989. The contract, dated April 7, 1989 reads, inter alia:

"1989 April 07

Dear Mr. Lowe

Following your interview..... I am directed to confirm Management's decision to offer you an appointment on contract within the Security arm of the Company and specifically for the Hospital Security Service.

This contract is for a period of nine and a half (9 ½) months and will be subject to renewal as may become necessary.....

Salary

Your contract salary will be Twenty Three Thousand, Thirty Seven Dollars and Fifty Cents (\$23,037.50) for the nine and a half (9 ½) months period and you shall be paid on a fortnightly basis in accordance with Company practice." (Our emphasis)

According to the salary details of the first employment contract, Officer Lowe would have received a fortnightly wage of approximately \$1,123.78. Whether his salary included COLA, the contract did not specify. He subsequently received another contract of employment on January 9, 1990. This contract reads, inter alia:

"9th January, 1990

Dear Mr. Lowe

TEMPORARY EMPLOYMENT – SECURITY

I refer to your recent interview for employment with this company and offer you a position under the following terms and conditions:

- 1. The contract is temporary for a period beginning 01st January, 1990, to 31st December, 1990;*
- 2. Your Job Title is that of Senior Security Officer*
- 3.*
- 4. Your wage is \$13.99 per hour and is subject to normal statutory deductions. You will be paid at the end of each fortnight through the Company's bank assignment system...." (Our emphasis)*

Although the latter contract was signed by the Divisional Manager on January 1, 1990, there was no employee's signature on the document presented to this Tribunal. However, the Tribunal noted that no mention was made of COLA payments in his salary particulars.

Although the first contract of employment does not specify the precise date that Officer Lowe was hired by the Company, the aggrieved Officer, in his viva voce and witness statement testified that he was employed on March 16, 1989. This evidence was corroborated by both Parties in their respective statements of Evidence and Arguments (Paragraph 3 of the EPA's and Paragraph (5) of the Company's statement of Evidence and Arguments). There was, however, an attempt by the aggrieved Officer to refute his own testimony when he gave evidence that he began working with the Company before March 16, 1989. Again, there was no documentary evidence to substantiate this claim, and to convince the Tribunal that he was hired by the Company before March 16, 1989.

DECISION

According to the evidence, Officer Lowe was hired on March 16, 1989. This date was of significance since it officially established a qualifying date to subdivide the Company's senior security personnel into two (2) groups. Those hired prior to March 16, 1989 were deemed '**red circle**' security officers who would have "**enjoyed superior conditions of employment**" compared to those security officers employed on March 16, 1989 and onward who would not have enjoyed such conditions of employment. One such superior condition was the payment of COLA. Following the Company's decision to discontinue the payment of COLA in January, 1994, the Parties subsequently signed a MOA where it was agreed, inter alia, that all '**red circle**' security officers were to receive "**COLA Arrears, effective February 28, 2003.**"

Officer Lowe, by the very date of his employment did not qualify as a '**red circle**' security officer and as such, did not receive superior conditions of employment such as COLA benefits. Having never received COLA, he would not have been entitled to receive COLA arrears which were paid to the Company's '**red circle**' security officers.

The Tribunal noted that “**outstanding COLA monies**” were not effectively paid on February 28, 2002 as alleged by the Association and as stated in the Unresolved Certificate issued by the Minister of Labour and Small and Micro Enterprise Development dated January 14, 2008. “**Outstanding COLA monies**”, according to the Parties’ MOA were to be effectively paid from February 28, 2003.

There was only one piece of documentary evidence that is, the job letter, which the Association relied on in their bid to prove that Officer Lowe was in receipt of COLA. This, in the Tribunal’s view was insufficient to establish the Association’s claim that Officer Lowe was in receipt of COLA and that he would have been eligible to receive outstanding COLA arrears.

Accordingly, this dispute is dismissed.

It is so ordered.

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H. H. Mr. V. E. Ashby
Chairman

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H. H. Mrs. Judy Rajkumar-Gualbance
Member

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H.H. Mr. L. Achong
Member