SOCIETE ALEX BHUJOHARRY v

PRIVATE SECONDARY EDUCATION AUTHORITY & ANOR

2024 SCJ 341

Record No.121251

THE SUPREME COURT OF MAURITIUS

In the matter of:

Societe Alex Bhujoharry

Applicant

v

Private Secondary Education Authority

Respondent

In the presence of:

Ministry of Education, Tertiary Education and Scientific Research

Co-Respondent

JUDGMENT

The applicant was granted leave to apply for a judicial review of the respondent's decision to implement the Revised Comprehensive Grant Formula ("the RCGF") under which grants are paid by the respondent to grant-aided schools as from November 2020. The grounds for seeking judicial review are that the said decision is illegal, manifestly unreasonable, contrary to the principles of natural justice, contrary to the Wednesbury principle, against the applicant's legitimate expectation and unfair. It is also seeking an order directing the respondent to bring before this Court all the records, files, calculations and rationale relating to its decision to implement the RCGF in order to have the said decision quashed, reversed or set aside.

The applicant is the owner of Bhujoharry College, a private secondary grant-aided school ("the school"). The respondent is a statutory body established under the Private Secondary Education Authority Act ("the PSEA Act") and operates under the aegis of the co-respondent. It is responsible for the payment of grants to private secondary grant-aided schools.

The respondent and the co-respondent did not object to leave being granted, but are objecting to the motion for judicial review.

We have carefully considered the affidavits and annexed documents filed by the respective parties and given due consideration to both the oral and written submissions of Counsel.

Breach of legitimate expectation

The applicant's principal argument was that the decision of the respondent to implement the RCGF is in breach of its legitimate expectation.

In **Jawaheer Y. v Ministry of Education, Tertiary Education, Science and Technology & Ors** [2021 SCJ 271], which was referred to us by learned Counsel for the applicant, the Court explained that -

> *'… the classical definition of the principle of legitimate expectation, as provided by the House of Lords (per Lord Diplock) in* ***Council of Civil Service Unions v Minister for the Civil Service (1985 A.C. 374)****, is that, for a legitimate expectation to arise, the decision "must affect (another) person ... by depriving him of some benefit or advantage which –*
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> *(i) either he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or*
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> *(ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.'"*

He further quoted the case of **Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363** where the Court stated that:

> *"Where a public authority has issued a promise or adopted a practice which represents*

how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so."

In the present case, the applicant is challenging the decision to implement the RCGF. In essence, its contention is twofold –

1. it is no longer being paid compensation for the use of "other facilities"; and
2. it is no longer being paid for past investments,

under the RCGF when it was previously being paid therefor.

Learned Counsel for the applicant argued that, since the implementation of free education in January 1977 in Mauritius, the applicant has always been the recipient of compensation and grants from the respondent for putting its school premises **together with its facilities** at the disposal of the respondent. Relying on the compensation and grants received from the respondent which covered both the school premises and its other facilities, the applicant took two banking facilities of the order of Rs 30 million and Rs 9.6 million respectively to invest into the school premises and facilities. The two loans have been consolidated and the applicant has to pay Rs 282,376 monthly as loan repayment.

He submitted that under the previous formula, although the school was not paid the full annual rental value ("ARV"), it was able to repay its loan with the combination of the sum paid for the use of the premises and the compensation paid for "other facilities". He argued that although the school is compensated for any new equipment that it purchases under the RCGF, there is however no payment for past investments made in facilities, for example, in the computer room, sports facilities etc...

He laid much emphasis on the Report on the New Comprehensive Grant Formula which was recommended in July 1994. He underlined that under the said Report, the Management Grant was subdivided into two elements, namely, the Management element and the Incentive element. The Incentive element was to cater for *"academic facilities, sports facilities, academic performance, participation and performance in sport activities and participation and performance in extra-curricular activities*". He argued that, since the applicant had invested in the facilities referred to above, it should continue to receive compensation for its past investments in the said facilities. It was his contention that, in the past, the school had always been compensated for the use of "other facilites" but, under the RCGF, it now receives compensation for school premises effected on the basis of a capped ARV based on the valuation of a shell building which does not

represent the open market value, taking into account the "other facilities" provided by the school.

Learned Counsel for the applicant further argued that if, in the past, the applicant had, for example, constructed a computer room and equipped it with 10 new computers, it would have been compensated for its expenses relating to the computer room, i.e., the building itself, the cost of acquisition of the computers and also for allowing the computers to be used over the years. He argued that if the school had acquired computers, it should continue to receive compensation for its investment therein. He was however unable to enlighten the Court as regards the number of years during which the school should continue to receive compensation for a computer acquired 10 or 20 years ago and whether it should continue to receive compensation *ad aeternum*. He contended that whatever be the year in which the applicant had invested in facilities, it should continue to receive compensation for that investment.

For her part, learned Counsel for the respondent argued, in a gist, that the applicant was, and is still, being paid compensation for the use of its school premises and for the renewal of its facilities. She highlighted that there was no item of grant for past investments made by schools under the CGF 2016-2018 and the applicant did not have an issue with the said formula. She also made a comparison of the compensation being paid to the applicant under the RCGF and under the CGF to buttress her contention that the applicant is being compensated for the use of its premises and its facilities under the RCGF.

Compensation for "other facilities"

Pursuant to section 15 of the PSEA Act, the amount of grant payable to private secondary schools is determined in accordance with such criteria as the respondent may, with the approval of the Minister, determine. Since the introduction of free education in 1977, the school is in receipt of a grant from the respondent. It is common ground that the amount of grant and the grant formula or grant system used to determine the amount payable to the school have evolved over the years.

It is apposite to briefly set out how the grant formula has evolved. However, for the present purposes, there is no need to delve into what happened prior to 1989. A revised formula for the payment of grants was to take effect as from 1 July 1989. Following representations made by Managers and the "Intersyndical", the Management Audit Bureau ("the MAB") was tasked by the Government to carry out an in-depth study of the private education sector. In its Report published in November 1989 (the MAB report 1989), it proposed a Comprehensive Grant Formula ("the CGF") consisting of an Operations Grant and a Management Grant.

The Operations Grant covered teaching and non-teaching staff expenses and other operations expenses while the Management Grant was (a) to provide for the remuneration of management staff; (b) to ensure that owners of colleges receive a reasonable return on their investment; and (c) to reward excellence in terms of academic performance as well as participation in sports and extra-curricular activities. According to the MAB report, the rationale of the Management Grant was to ensure that "Management receives **compensation for managing an institution, a reasonable return on investment and a reward for showing excellence in academic, sports and other facilities**."

A new CGF based on the same components as in 1989 was recommended in July 1994. The CGF was further reviewed in July 1997, July 2006 and July 2009 with the same components being recommended. In 2013, a new grant element, namely, the Prevocational element was introduced. In 2016, under the CGF 2016-2018 (which was in force till the coming into force of the RCGF in November 2020), the components were reviewed to consist of a Block Grant, a Performance Grant and a Rodrigues/Agalega element. The Block Grant included (i) compensation for the use of the totality of the school premises including the facilities, (ii) a management grant (which covered items such as the remuneration of the manager) and (iii) an operations grant (which catered for costs of goods and services, for example, printing and stationery).

It is relevant to note that according to the report of the New Comprehensive Grant Formula 2016-2018, compensation for the use of the school premises comprised compensation for use of the totality of the school premises. The amount paid for compensation for the use of the school premises was not limited to the ARV of the school buildings, but also included payment for "other school facilities" to reflect the investment made by the school in facilities such as renewal of school furniture, sports facilities and other equipment.

Now, the CGF 2016-2018, (over and above the Rodrigues/Agalega element), consisted of two components only, a Block Grant and a Performance Grant and the RCGF also consists of the same two components. However, the applicant contends that it is not being compensated for "other facilities" under the RCGF, while the respondent contends that the applicant is being compensated for "other facilities" under the Variable Component of the RCGF.

We note that, under the RCGF, the Block Grant is subdivided into a Fixed Component and a Variable Component. The Fixed Component is further subdivided into the ARV of the premises and the Managerial Grant.

It is apposite to note that, in its affidavit dated 8 March 2021, the applicant averred that between October 2016 and July 2019, prior to the implementation of the RCGF, it received an average of Rs 652,000 monthly made up as follows under the Block Grant –

(i) Rs 80,000 as compensation for **Operations Grant**;
(ii) Rs 40,000 as compensation for **Management Grant**;
(iii) Rs 200,000 as compensation for **the premises** (ARV); and
(iv) Rs 332,000 as compensation for **other facilities**;

Thus, under the CGF 2016-2018, the applicant received compensation in respect of four items, the Operations Grant, the Management Grant, the premises (ARV) and other facilities. Under the RCGF, the applicant is still being paid compensation for the Management Grant and compensation for the premises (ARV) under the Fixed Component. The evidence on record shows that, from August 2019 to December 2020, under the CGF 2016-2018, it received a total sum of Rs 243,160 (Rs 43,160 plus Rs 200,000) monthly as compensation for the Managerial Grant and ARV. Under the RCGF, it received the total sum of Rs 781,125 for 3 months (January 2021 to March 2021), i.e., a sum of Rs 260, 375 monthly under the Fixed Component, i.e., for the Management Grant and the premises (ARV).

Now, it is undisputed that, under the RCGF, the applicant has, over and above the compensation under the Fixed Component, also received compensation under the Variable Component. It is significant that, under the RCGF, the applicant received Rs 1,340,312.22 under the Variable Component for the months of January 2021 to March 2021, i.e., Rs 446,770 monthly. The evidence on record shows that, for the period August 2019 to December 2020, under the CGF 2016-2018, the applicant was paid Rs 86,320 as compensation for Operations Grant and Rs 358,228 as compensation for other facilities monthly, i.e., a total sum of Rs 444,548 (Rs 86,320 plus Rs 358,228) monthly.

Taking the above into consideration, we agree with learned Counsel for the respondent that payment for other facilities is catered for under the Variable Component of the RCGF and that the applicant is still being compensated for “other facilities” under the RCGF.

Learned Counsel for the applicant also argued that although under the CGF 2016-2018, the monthly compensation for the use of the school premises was subject to a ceiling of Rs 200,000, the compensation received by school owners for the use of “other facilities” offset the shortfall with respect to the capped compensation received for the use of the premises.

It is apparent from the above that, under the RCGF, the applicant is not only still being compensated for the items for which it was previously being compensated under the CGF 2016-2018 but is, in fact, receiving more compensation as a whole under the RCGF. Further, as rightly pointed out by learned Counsel for the respondent, the applicant does not seem to have any qualm regarding the CGF 2016-2018. In any event, it did not challenge the said formula. In the circumstances, we fail to understand how it can be argued that it is worse off in so far as the compensation which is being paid to it under the RCGF is concerned.

In its affidavit, the respondent explained that under the Variable Component, Direct expenses relate to payments made to schools for meeting expenses pertaining to non-administrative expenditure which are incurred in the day to day running of the school. Examples of items which would fall under this component are repairs and maintenance of school and office equipment, sports requisites and costs incurred for Sports Day, Music Day etc… Under the Variable Component, administrative expenses, as indicated by its name relate to expenses pertaining to administrative expenditure. An example would be payments for utilities such as internet facilities. In so far as non-recurrent expenses under the Variable Component are concerned, they are paid to meet expenses relating to the acquisition of non-financial assets, for example, acquisition of equipment, furniture, fittings and the required technology for specialist rooms like laboratories, computer rooms, purchase of books and IT materials for the library, upgrading/construction of volleyball/basketball pitch, football ground, tennis court, enhancement of staff room and mess room, modern IT and other equipment for office use.

It is clear from the above that, under the RCGF, if we were to take the example referred to earlier of the new computer room which is equipped with computers by the school in a given year, the school would be compensated for the construction of the computer room through the compensation received for the premises (ARV) under the Fixed Component. In so far as the computers are concerned, the school would be compensated for their repair and maintenance under the item “direct expenses” of the Variable Component, and, in so far as the purchase price of new computers are concerned, it would be still be compensated under the item “non-recurrent expenses” of the Variable Component. In other words, the school would thus still receive

compensation under the RCGF for its premises under the Fixed Component and for other facilities, here the computers, under the Variable Component.

Taking all the above into consideration, we find that there is no merit in the submission made on behalf of the applicant that, with the implementation of the RCGF, it is no longer being paid compensation for the use of "other facilities". We agree with learned Counsel for the respondent that, under the RCGF, the applicant is being compensated for other facilities under the Variable Component.

Compensation for past investments

In so far as the question of payment of compensation for past investments is concerned, when one carefully examines the previous grant formulas and in particular the two previous CGFs under which grants were being paid prior to the coming into effect of the RCGF, it is clear that there was no item of compensation for past investments as such. It is worth reiterating that under the CGF 2013-2015, schools received three types of compensation: (a) compensation for their managerial input which consisted of a fixed sum of money, (b) a management element which constituted 90% of the ARV of the school with a ceiling limit of Rs 160,000 and (c) compensation for other facilities including academic facilities, sports facilities, library and computer education. In addition, schools received grants in the form of per capita grant, per student subject element, grants for academic performance and grants for prevocational education. There was, therefore, no item which specifically compensated the school for past investments. It is also worth reiterating that under the CGF 2016-2018, the grant payment was divided into two elements, the Block Grant and the Performance Grant plus the Rodrigues/Agalega element. As depicted above, the Block Grant included compensation for the use of the school premises, compensation for the use of other facilities, a Management Grant (which covered items such as the remuneration of the manager) and an Operations Grant (which catered for costs of goods and services for example printing and stationery).

In addition, as stated above, in its affidavit, the applicant avers that between October 2016 and July 2019, it received an average monthly compensation of Rs 652,000 made up of Rs 80,000 as compensation for Operations Grant, Rs 40,000 as compensation for Management Grant, Rs 200,000 as compensation for the premises (ARV) and Rs 332,000 as compensation for other facilities. The applicant also avers that, between August 2019 and December 2020, it received compensation under the above heads only. Thus, as per the applicant's own affidavit, there was no item of compensation under the CGF 2016-2018 which was for past investments as such.

As rightly submitted by learned Counsel for the respondent, the applicant had no issue with the CGF 2016-2018 under which there was no item of the grant which catered for past investments. In the circumstances, we fail to see how it can be contended that, with the implementation of the RCGF, the applicant has been deprived of any benefit or advantage which it had in the past been permitted to enjoy by the respondent and which it could legitimately expect to be permitted to continue to enjoy. The applicant has also failed to establish that the respondent has departed from a promise issued by it or a practice which it had adopted of compensating the applicant for past investments.

Learned Counsel for the applicant argued that the applicant had a substantive legitimate expectation since 1977 to be compensated for the use of its school premises which included the land, building and the provision of other facilities such as academic and sports facilities. This legitimate expectation arose firstly by way of an express promise which was found in the MAB Report which provided that the Government is responsible for ensuring that school owners receive "a reasonable return on owner's investment as well as a fee in recognition of managerial services rendered and responsibilities shouldered". This was a clear and unambiguous promise and devoid of relevant qualification. He further argued that the applicant **relied on past payments** to take a loan and it was able to repay same under the previous CGF. However, it is unable to do so under the RCGF.

It is clear from the above that the only legitimate expectation that could have arisen from the above is for the school to receive a "*reasonable return on [its] investment as well as a fee in recognition of managerial services rendered and responsibilities shouldered*." It can be gleaned from Document G annexed to the applicant's affidavit dated 8 March 2021 that it took a first loan of Rs 30 million in May 2011 (Rs 22 million for building purposes and Rs 8 million for furniture, equipment and landscaping) and a second loan of Rs 9.6 million on 7 April 2017 for purchase of land. According to the applicant, the loans were consolidated and it now needs to repay approximately Rs 282,376 as principal and interest in respect of the said loans monthly.

Now, the details of the monthly grants disbursed to the applicant (paragraph 8(d) of the respondent's affidavit dated 3 September 2021) reveal that it was receiving a monthly grant of Rs 598,429.52 under the CGF 2013-2015 and a monthly grant of Rs 652,000 under the CGF 2016-2018. Following the implementation of the RCGF, the applicant has received Rs 707,145.74 monthly from January to June 2021 and Rs 635,790 for the months of July to September 2021.

The applicant has neither challenged the compensation paid to it under the CGF 2013-2015 nor under the CGF 2016-2018. It follows that it therefore agreed that the monthly grants paid to it under the said CGFs represented a "*reasonable return on [the schools] investment as well as a fee in recognition of managerial services rendered and responsibilities shouldered"* for the use of its school premises which included the land, building and the provision of other facilities such as academic and sports facilities.

Taking into consideration that monthly grants paid to the applicant under the RCGF are more than what it received under the CGF 2013-2015 and that there is no big disparity between the sum which was received under the CGF 2016-2018 and that received by the school under the RCGF, we fail to understand how it can be contended that they do not represent a "*reasonable return on [the schools] investment as well as a fee in recognition of managerial services rendered and responsibilities shouldered"* or that the RCGF is in breach of the applicant's legitimate expectation.

The applicant's stand is that it was able to repay its loan under the CGF 2016-2018. Taking into consideration the sum of money which the applicant received by way of monthly grants under the CGF 2016-2018 (Rs 652,000) and the RCGF (Rs 635,790 from July to September 2021), we find that the applicant's contention that it was able to repay the loans in the past, but is now unable to do so under the RCGF is clearly untenable.

Finally, we observe that the loan was a personal loan contracted by the applicant from a commercial bank on terms which were agreed between the parties to the loan agreement without the respondent's involvement. As rightly submitted by learned Counsel for the respondent, the role of the respondent is to pay grants to schools for running the schools and not to service loans taken by them. In any event, the applicant has failed to establish that it acted on a promise from the respondent or a practice adopted by it when it took the loan and that the respondent has departed from the said practice or promise.

For all the reasons given above, we find that the issue of legitimate expectation does not arise. There is no evidence that the applicant has been "*deprived of some benefit or advantage which it had in the past been permitted by the respondent to enjoy"* or that the respondent *"has issued a promise or adopted a practice which represents how it proposes to act"* and departed therefrom.

Illegality, breach of the principles of natural justice and Wednesbury unreasonableness

Learned Counsel for the applicant argued that the respondent unilaterally changed the CGF 2016-2018 when it adopted the RCGF and that this is in breach of the principles of natural justice. However, the affidavits filed by the applicant contain no averment to substantiate its claim. On the contrary, we note that when the Technical working group was set up by the co-respondent to review the CGF 2016-2018, it requested the Federation of Unions of Managers of Private Secondary Schools to submit its proposals on the review of the grant formula and the proposals were duly submitted to the Technical Working Group for consideration. In the circumstances, it cannot be argued that there was any breach of the rules of natural justice.

The applicant is also relying on the grounds of illegality and Wednesbury unreasonableness to challenge the decision to implement the RCGF. However, learned Counsel for the applicant did not offer any submission in this regard.

At any rate, it is clear that the respondent has acted within the purview of its powers under the PSEA Act when it implemented the RCGF. Pursuant to the PSEA Act, the respondent has an obligation to pay a grant the amount of which has "*to be determined in accordance with such criteria as it may, with the approval of the Minister, determine*." Further, section 5 of the PSEA Act confers a statutory mandate on the respondent to formulate appropriate policies, make rules, issue guidelines and directives, and set standards and conditions for ensuring efficiency and transparency in the manner in which grants are used by secondary schools.

The applicant seems to be challenging the RCGF itself as opposed to the procedure through which it was adopted. As long as the respondent acts within the confines of its powers, the Court will be loath to interfere with its decision regarding the amount of grant paid or the criteria used to determine the amount of the grant.

The evidence on record shows that the RCGF was recommended by a Technical Working Group which was set up in 2019 by the co-respondent. The recommendations of the Technical Working Group were based on an in-depth evaluation of the existing system of disbursement of grants to private secondary schools with a view to detecting any weakness and deficiency, an analysis of the Income and Expenditure Account and the balance sheet of some private secondary schools submitted to respondent and an examination of the ICAC Report "Corruption Prevention Review" on the system.

It is also relevant to note that the respondent effects payments of grants to schools from a General Fund which is established under the PSEA Act and consists of money received from, *inter alia*, the Consolidated Fund. It is the respondent's duty to ensure that the grants are used for their intended purposes and to implement measures to guarantee efficiency and transparency in the manner in which grants are used by schools. The respondent and the co-respondent have both explained that the RCGF has been designed to ensure greater accountability and transparency in the utilisation of grants disbursed to grant-aided private secondary schools out of public funds.

Taking all the above into consideration, we find that the applicant has failed to establish that the decision to implement the RCGF is illegal or unreasonable, let alone Wednesbury unreasonable.

For all the reasons given above, we set aside the application. With costs.

D. Chan Kan Cheong
Ag. Senior Puisne Judge

K. D. Gunesh-Balaghee
Judge

25 July 2024

Judgment delivered by Hon K. D. Gunesh-Balaghee, Judge.

For Applicant	**:**	**Me Z. I. Salajee, Senior Attorney** **Me R. Pursem, Senior Counsel**
For Respondent	**:**	**Me R. Camiah, Chief State Attorney** **Me P. Ramjeeawon-Varma, Parliamentary Assistant Counsel**
For Co-Respondent	**:**	**Me D. K. Manikaran, Principal State Attorney** **Me V. Biefun, Ag. Principal State Counsel**