

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/ RN 36/20

Before

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|-----------------------------------|-------------------------|
| Indiren Sivaramen | Acting President |
| Marie Désirée Lily Lactive | Member |
| Karen K. Veerapen | Member |
| Ghianeswar Gokhool | Member |

In the matter of:-

Mr Assif Beharee (Disputant)

And

Cargo Handling Corporation Ltd (Respondent)

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 70(4) of the Employment Relations Act, as amended (hereinafter referred to as “the Act”). The parties were assisted by Counsel. The terms of reference of the points in dispute read as follows:

“Whether I, Mr Beharee Assif, holding the post of Senior Supervisor in the Cargo Handling Corporation Limited, should be granted an increment of Rs 1000/- to put me at par with my other colleagues in the same department being the most senior with effect from 15.12.2017 or otherwise.”

The Disputant deponed before the Tribunal and he solemnly affirmed as to the correctness of the contents of his Statement of Case. He stated that he was confirmed in the post of Driver at the Respondent on 3 January 2004. On 1 June 2006, he was transferred to work at the Multi Purpose Terminal as Terminal Assistant. He was however not confirmed in that post and in 2008, he was reverted to his post of Driver. He felt discriminated and eventually came before the Tribunal whereby an award of the Tribunal

was delivered. He then produced a copy of a letter dated 28 December 2012 (Doc F) whereby it was stated as follows:

“We are pleased to offer you appointment as Terminal Assistant in the Cargo Handling Corporation Ltd with effect from 01 November 2012. However, for seniority purposes only, you will be considered as having been appointed as from the date you were reverted to your substantive post of Driver i.e as from 06 October 2008.”

On 7 July 2014, he was offered a promotion as Senior Terminal Officer. He then produced a copy of a seniority list for Senior Terminal Officer (Doc H) and he was second in terms of seniority on the said list. He however suggested that the date 1 November 2012 mentioned as date of appointment in the last grade (“DALG”), that is, as Terminal Assistant, should be 6 October 2008 instead of 1 November 2012. He was again promoted in 2017 and he became Senior Supervisor. He produced a copy of the letter of offer of promotion (Doc I). He stated that in August 2019 he came to know that one of his colleagues on the list at Doc H was earning more than him. He produced copies of his payslip and that of the said colleague whose name was blotted out on the copy produced (Docs J and K respectively). The basic salary of his colleague was Rs 1000- more than his. He stated that the said colleague was less senior than him on the seniority list produced. He stated that he is the most senior one and his junior is earning more than him. He prayed that he be granted an increment so that he earns the same salary as his colleague as from the date of the last promotion in 2017 or as from the date the dispute was referred to the Tribunal. He stated that the first officer mentioned on Doc H has already retired and that only four officers, including himself, have been promoted as Senior Supervisor in 2017 and that they are all doing the same work.

In cross-examination, Mr Beharee stated that the said seniority list is dated 14 August 2017. He agreed that if the dates mentioned in the seniority list under the column “DALG” are considered, the dates mentioned for employees in the third, fourth and fifth positions would be before the date mentioned for him. He agreed that when he was promoted, his salary increased. He also accepted that as per the Salary Restructuring Report (SRC), one is entitled on promotion to a maximum of three increments. He agreed however that on promotion one cannot earn more than the salary of an employee who is already in the post to which one has been promoted. He then clearly admitted that his salary was less than those of his colleagues because the latter were occupying the post he was promoted to before him and that the Respondent did everything according to the SRC.

Mr Beharee accepted that every time he was promoted, the seniority list was given effect to. However, he still stated that he felt discriminated in relation to the salary paid to him.

Mr Dahari, Human Resource Manager, deponed on behalf of the Respondent and he stated that he agreed with the contents of the Statement of Case filed on behalf of the

Respondent. He stated that the post of Terminal Assistant is a post at entry level for a grade. In 2006 there was a shortage of Terminal Assistants and a few employees who were drivers were assigned to do the work of Terminal Assistant. They were then given an acting allowance. He stated that with the salary report of 2003, Mr Beharee was qualified to do the work of Terminal Assistant but with the new 2008 salary report, new qualifications were required for the post of Terminal Assistant. Subsequent to the 2008 salary report, Mr Beharee was not qualified for the said post and the Board on the recommendation of the Staff Committee decided to revert the Disputant back to his previous grade. Management then canvassed for the purpose of the salary report that experience in a job should also be considered and in an addendum to the 2008 salary report, it was provided that weightage should be given for competencies and experience.

Based on this recommendation and even though Mr Beharee was not qualified for the post, the Staff Committee accepted exceptionally to grant him the said post based on his experience. Mr Dahari confirmed that Disputant was subsequently promoted based on the letter dated 28 December 2012. He stated that on promotion, one earns the initial salary of the new salary scale or earns a maximum of three increments. However, this is subject to a guiding principle which is applied for all promotions granted at the Respondent, that is, that the newly promoted employee cannot earn more than someone who was already in that salary scale. He stated that this principle emanates from the SRC Report of 1996 but that it has been applied since then at the Respondent. When Disputant joined his new grade as from 1 November 2012, there were already employees who were Terminal Assistants.

In cross-examination, Mr Dahari stated that even for acting allowance the same principle is applied and that one cannot with his salary and acting allowance earn more than an employee who is already in the post. He stated that the others who were appointed as Terminal Assistants were appointed in 2008 and that Disputant was reverted to his post of Driver in October 2008. Mr Dahari stated that a case such as the present one is very rare and that he is not sure the backdating of the appointment of Disputant, albeit for seniority purposes only, can still be done today. He stated that Mr Beharee was appointed on 1 November 2012 but that this was backdated as from October 2008 for seniority purposes only since he was working as Terminal Assistant in 2008 so as not to penalize him in the future. He agreed that Disputant was second on the seniority list (Doc H) and that those who were lower in the seniority list "*pas capav depasse li dans la paye*".

The Tribunal has examined all the evidence on record including all the documents produced and the submission of both Counsel. Doc K (where the name and employee number of the employee have been blotted out) is for payday of 20 August 2019 and relates to an employee who is (or at least was) in the same grade as Disputant, that is, Senior Supervisor. We do not have the seniority list for Senior Supervisor and have only a seniority list dated 14 August 2017 for Senior Terminal Officer (underlining is ours). We

understand from the evidence that after his promotion as Senior Terminal Officer, the Disputant was further promoted as Senior Supervisor with effect from 1 December 2017 (vide Doc I). As per the terms of reference, the point in dispute is whether Disputant, holding the post of Senior Supervisor at the Respondent, should be granted an increment of Rs 1000/- to put him at par with his "other colleagues in the same department being the most senior with effect from 15.12.2017 or otherwise."

The Tribunal does not have sufficient evidence as to the promotion exercise in 2017, the exact date or dates of promotions of the workers concerned, any Senior Supervisor who would already have been appointed/promoted as such before Disputant was promoted in 2017, or even simply evidence in relation to the seniority list for Senior Supervisor. The evidence adduced on both sides had more to do with the appointment of Disputant as Terminal Assistant. Even Doc N which has been produced relates, according to Mr Dahari, to the calculation for the salary to be granted to Disputant on his appointment to the grade of Terminal Assistant from the grade of Driver. If the evidence of Disputant is to be accepted 'in toto', that is, at its best, there is only evidence on record that only the first five workers mentioned on Doc H have been promoted as Senior Supervisor. The worker whose name appears first on Doc H has retired and thus only the four employees whose names appear next on the same list, including Disputant, have been promoted as Senior Supervisor in 2017. The Disputant however did aver in his Statement of Case the following:

9. On the 15th of December 2017, the Disputant was offered promotion as Senior Supervisor at the Respondent with effect from 01st December 2017 drawing a basic salary of Rs 31,675 inclusive of additional remuneration.

10. After promotion when the Disputant compared his salary with his other colleagues on the same level as him, he noticed that he was drawing Rs 1000/- less i.e. his colleagues were drawing the basic salary of Rs34,550/- and he was drawing a basic salary of Rs33,550.

11. The Disputant complained to management as he was not being remunerated for equal pay for work of equal value, the moreso he was the 2nd most senior in his category.

We take it that when Disputant averred that he was the second most senior in his category at paragraph 11 of his Statement of Case, he was referring to the grade of Senior Supervisor but Respondent did not make any admissions as regards paragraphs 9, 10 and 11 above. Respondent has instead averred the following at paragraphs 6(c) to (f) of his Statement of Case:

6(c) After the Disputant's formal appointment as Terminal Assistant in 2012, even if his appointment took effect as from 2008 and despite being second senior most on the seniority list of Terminal Assistants, those who had been formally appointed before the

Disputant, was already earning a higher salary than him, having advanced on the salary scale of Terminal Assistants;

(d) This is therefore not a question of discrimination in pay or other anomaly, but simply a matter of the salary scale in place. The other employees in the same post have joined the relevant scale before. The Disputant will also move up the scale.

(e) the Disputant's seniority on the seniority list of Terminal Assistant has been considered in two promotion exercises namely promotions to the posts of Senior Terminal Officer in 2014 and Senior Supervisor in 2017. Seniority list is the list that the Respondent may use for promotion exercise. As regards pay, the Respondent applies the relevant scale in place; and

(f) Hence, despite his seniority, the Disputant could not be favoured by being paid a salary which is at par with those who have been substantively appointed in that post before him and who advanced on the salary scale of that particular post since the date of their substantive appointment.

The Disputant has not adduced sufficient evidence to show that he is actually the most senior in the post of Senior Supervisor (underlining is ours). It is apposite to note that the letter of promotion dated 15 December 2017 issued to Disputant provides as follows:

“Confirmation in your promotional grade will be considered after having completed six months’ service and will be subject to being favourably reported upon by your Head of Department.” The Disputant is relying on Doc H (seniority list for Senior Terminal Officer) to say that he is the most senior and yet he is also the one who is challenging an important date mentioned on the same document, that is, his date of appointment in his last grade (D.A.L.G). In the light of all the evidence on record, the stand of the Respondent which is fairly vague in relation to seniority in the grade of Senior Supervisor, and the absence of the other Senior Supervisors, the Tribunal finds that it will be unsafe to find conclusively that Disputant is currently the senior most in the grade of Senior Supervisor. The Tribunal is not going to make assumptions or inferences on such an issue.

Also, more importantly, Disputant is relying on the principle of ‘Equal remuneration for work of equal value’. This principle certainly does not preclude the setting up of salary scales whereby officers will move up in a salary scale with time. This is not a case where Disputant, as Senior Supervisor, is kept in a salary scale which is lower than the salary scale in which other Senior Supervisors are.

The version of the Respondent that the dispute has nothing to do with discrimination in pay or other anomaly but concerns simply the salary scale in place at the Respondent has also remained unchallenged. The granting of a gross salary of Rs 31,675 to Disputant

as from 1 December 2017 following his promotion as Senior Supervisor (as per Doc I) has also not been challenged.

In the present case, the special circumstances leading to the appointment of Disputant as Terminal Assistant whereby a very specific letter had to be issued to the latter with a rather unusual first paragraph as quoted above need to be pondered. This was done, according to the Respondent, so as not to penalize the Disputant and this has never been denied before us on behalf of the Disputant. The Tribunal understands that Disputant in fact benefitted from the decision taken whereby for 'seniority purposes only', he was considered to have been appointed as Terminal Assistant as from the date he was reverted to his substantive post of Driver, that is, as from 6 October 2008. The Tribunal certainly cannot and will not comment on the reasonableness or merits of such a decision. However, the evidence adduced before us including documents produced tends to show that this case is far from the case where a more senior employee who has been in a particular grade well before other employees end up earning less than employees who join the grade after him.

For all the reasons given above including the absence of satisfactory evidence as regards seniority in the grade of Senior Supervisor, the Tribunal finds that the Disputant has failed to prove his case on a balance of probabilities. The case is thus set aside and the Tribunal awards accordingly.

SD Indiren Sivaramen

Acting President

SD Marie Désirée Lily Lactive

Member

SD Karen K. Veerapen

Member

SD Ghianeswar Gokhool

Member

14 July 2020