

EMPLOYMENT RELATIONS TRIBUNAL

AWARD

ERT/RN 157/2019

Before: -

Shameer Janhangeer	Vice-President
Raffick Hossenbaccus	Member
Rabin Gungoo	Member
Ghianeswar Gokhool	Member

In the matter of: -

Mr Rama Krishna MUDALIAR

Disputant

and

MAURITIUS HOUSING COMPANY Ltd

Respondent

The present matter has been referred to the Tribunal for arbitration by the Commission for Conciliation and Mediation (“CCM”) in accordance with *section 69 (7)* of the Employment Relations Act. It must be noted that the matter was reported to the CCM before the coming into effect of the *Employment Relations (Amendment) Act 2019 (Act No. 21 of 2019)*. The Terms of Reference of the dispute reads as follows:

Whether I should have been appointed to the post of Deputy Managing Director following my ‘reinstatement’ on 06.02.19.

Both parties were assisted by Counsel. Mr A. Daby together with Mr T. Daby, of Counsel, appeared for the Disputant instructed by Mr A. O. Jankee, Attorney-at-Law. Mr N. Hussene, of Counsel, appeared for the Respondent instructed by Mr R. Mootosamy, Attorney-at-Law. Both sides have filed their respective Statements of Case in the present matter.

THE DISPUTANT'S AMENDED STATEMENT OF CASE

The Disputant started working for the Mauritius Housing Company Ltd ("MHC") in June 1992 as Internal Auditor, a post considered as third in the managerial hierarchy. In 2001, he was Officer-in-Charge ("OIC") of the Finance Division and paid an allowance for same. In 2003, he was called to take additional responsibilities to supervise the Commercial and ICT Divisions. In 2005, the Respondent's Board called upon him to act as OIC of the Respondent. He ceased to work in the Finance Division as he now had to supervise all the Divisions in the company. A new Managing Director was appointed in 2006 and he resumed his duties as OIC of the Finance Division. In 2008, the post of Deputy Managing Director ("DMD") was created to assist the Managing Director.

An interview was carried out for the post of DMD in 2008, following an internal advertisement, to which he and two others applied. The latter two were juniors and they were all interviewed by the Corporate Governance and HR Committee. The Disputant was thereafter assigned the duties of the aforesaid post and his appointment was approved by the Board. Copies of his letter of appointment dated 8 October 2008 and his acceptance letter dated 10 October 2008 are annexed. He occupied the post up to October 2009 when he was interdicted following false and malicious charges levelled against him. A formal charge was lodged against him by the Independent Commission against Corruption ("ICAC") in October 2009. He was suspended on 28 October 2009 following prosecution by ICAC before the Intermediate Court. On 3 October 2018, the Intermediate Court dismissed the charges brought against him.

The Disputant thereafter, on 3 October 2018, wrote to the Respondent to be reinstated to his post of DMD (copy of letter is annexed). On 19 November 2018, he was informed that the Board had decided to reinstate him as Internal Auditor with effect from 28 October 2009 (letter annexed). The Bank of Mauritius cleared the Disputant as a fit and proper person to be reinstated. He had to assume duty as Internal Auditor on 6 February 2019, would be

remunerated a lesser salary than what he was obtaining prior to his suspension and was not assigned the duties of DMD, despite the post being vacant. He protested in writing to the OIC as well as to the Financial Secretary of the Ministry of Finance and Economic Development.

The Disputant considers his contract of employment to have been unilaterally modified by the Respondent in changing his remuneration to an inferior sum to what he earned prior to his suspension. As from his reinstatement, he is now sixth in the Respondent's hierarchy. He works under the direction and reports to officers' junior to him. As his protests were unanswered, he reported a dispute to the CCM on 27 March 2019. The Disputant avers that his reinstatement is in fact an unfair and unwarranted demotion for which he is suffering prejudice, inconvenience and embarrassment. He therefore prays to be reinstated and confirmed in his post of DMD and to be paid all arrears due to him as DMD since the period of interdiction.

THE RESPONDENT'S AMENDED STATEMENT OF CASE

The Respondent has notably averred that since 2001, the Disputant's substantive post is that of Internal Auditor. As per minutes of the Board of 4 March 2005, the Disputant was not eligible and qualified to assume the post of Senior Manager (later restyled to DMD) and was therefore only given a responsibility allowance pending the recruitment of a qualified candidate. The post of DMD was offered to the Disputant on an assignment basis and the letter of offer dated 8 October 2008 clearly mentions that the assignment may be terminated at any time, in which case the Disputant would be reverted to Internal Auditor. The Disputant was never appointed to the post of DMD in a substantive capacity. Following a request of an increase in salary from the Disputant and to appoint him to the post of DMD, the Board, decided to maintain its previous decision.

The Respondent has taken note that the Disputant, as DMD, was required to discharge the duties of Managing Director as and when required. It is denied that the Disputant was reinstated as internal Auditor for which he was supposed to assume duty on 6 February 2019; that he would be remunerated a lesser salary than what he was obtaining at the time of his suspension; and not assigned the duties of DMD despite the post being vacant. The Respondent has further averred that the Disputant's letter of protest dated 8 February 2019 was misconceived inasmuch, *inter alia*, as it is a separate legal entity from its shareholders. The

Respondent has denied that the Disputant's contract of employment was unilaterally modified in changing his remuneration; that the Disputant is now number six in the Respondent's hierarchy; and that the Disputant has now been assigned to work under the direction and to report to officers junior to him.

The Respondent has also averred that no disciplinary committee was conducted against the Disputant following his suspension; Disputant was afforded ample time to complete his case before the Intermediate Court (Criminal Jurisdiction); the Respondent was not bound by the Criminal Court judgment and could have proceeded otherwise. The Respondent waited about nine years for the trial to end; and the Disputant was paid his basic salary, and benefited from successive increases in salary, during the nine year despite not performing any tasks for the Respondent. The claim of the Disputant is frivolous, vexatious and an abuse of process of the Tribunal.

THE EVIDENCE OF WITNESSES

The Disputant, Mr Rama Krishna Mudaliar, adduced evidence in the matter. He notably affirmed as the correctness of his Amended Statement of Case. He joined the MHC as number three in the hierarchy from the Bank of Mauritius as Internal Auditor. He was asked to shoulder higher responsibilities such as OIC of the Finance Department and that of the whole organisation. The post of DMD was created in 2008, he was appointed to same and became number two. After a gratuitous allegation, he had to face a trial before the Intermediate Court and was eventually acquitted. He was then made to resume duty as Internal Auditor. The post of DMD still exists and is currently vacant. The post of OIC Finance became evanescent upon the creation of the post of DMD. He was interdicted as number two at the MHC as DMD and he resumed as number six in the hierarchy. He is now worst off than when he started his career as number three at the MHC in 1992. He was not informed why he was not given the responsibilities of DMD upon resumption.

Mr Mudaliar further stated that the issue of assignment to the post of DMD is more in the nature of an appointment on probation as it was not made as a matter of administrative convenience to fill a gap in the organisation. An invitation for applications for the post of DMD was made through Circular ref. 16/2008 dated 14 August 2008. He applied for same and was

called for an interview, following which he was selected among three candidates. An offer for the post of DMD was made to him by letter dated 8 October 2008 (Annex A to the Disputant's Amended Statement of Case), which included a salary scale and a schedule of duties. He accepted the post. The post of Internal Auditor is not the same post as the one he held previously and has been downgraded during his interdiction. Upon his resumption, he protested to the OIC.

Mr Mudaliar also produced a letter dated 28 October 2009 from the MHC regarding his interdiction (Document A). Regarding his eligibility to the post of DMD, the Disputant produced a Notice of Vacancy titled '*Office Circular No. 17/2006*' (Document B) of the post of Senior Manager and asserted that he fully met the criteria laid in the aforesaid document. The post of Senior Manager was restyled to DMD. He also produced a letter dated 15 January 2007 (Document C) convening him to an interview. The post was not filled as the then Managing Director wanted to upgrade the post of Senior Manager to DMD. He does not agree that his performance as OIC of the Finance Department was not satisfactory and has never been informed of any discrepancy during his whole career at the MHC since 1992 in writing or otherwise.

Mr Mudaliar was questioned by Counsel for the Respondent. He notably stated that he did not agree that he was not appointed in a substantive basis to the post of DMD. He was on a probationary period as per his interpretation of the letter of appointment dated 8 October 2008. He agreed that the word '*probation*' is not mentioned in the aforesaid letter nor in his letter of acceptance dated 10 October 2008. He did not agree that in 2009, he was substantively employed as Internal Auditor. He did not agree that he was paid a basic salary of Rs 67,500 as at 27 October 2009 and an assignment allowance of Rs 7,500 for the post of DMD. He did not agree that he was earning a salary of Rs 65,000 as per what he stated in his own letter dated 10 October 2008. He was paid an allowance for shouldering higher responsibilities on an assignment basis.

Mr Mudaliar, moreover, replied that the selection process for the post of DMD was a normal administrative procedure followed in the filling of any post at the MHC. His letter of acceptance was clear. He produced the position description for the post of DMD (Document D) and read out the qualifications contained therein. His ACCA qualification is equivalent to a postgraduate degree. Prior to his appointment as DMD, he was drawing Rs 65,000 plus salary compensation. As per a pay slip for the month of December 2008, he was drawing a salary of Rs

65,000 and an assignment allowance of Rs 10,000. In November 2009, he was drawing a basic salary of Rs 67,500 as per the pay slip shown. He does not quite remember how much he was being paid as this was 7/9 years ago. He resumed as Internal Auditor and is being paid accordingly. The letter dated 19 November 2018 (Annex H to the Disputant's Amended Statement of Case) states '*... reinstated in your substantive post ...*' but he does not agree with same.

In re-examination from his Counsel, Mr Mudaliar stated that his entitlement to the interview for the post of DMD was never questioned. Regarding the Respondent's averment that he was not qualified and eligible to the post of Senior Manager, he stated that this is wrong and that the post of Senior Manager has nothing to do with DMD.

Mrs Ashvina Kalapnauth-Rajcoomar, Manager Corporate Services, deposed on behalf of the Respondent company. She notably stated that her department includes Human Resources and solemnly affirmed as to the correctness of the Respondent's Amended Statement of Case. Mr Mudaliar was appointed as DMD in October 2008 on an assignment basis. The Gobin Report, in relation to salary, prevailed effective as from 1 July 2008. The report provides for six types of appointments and she produced an extract in relation to same (Document E). She explained that probation is on a permanent pensionable basis, whereas there is no pension contribution for assignment basis. An Assignment Allowance is paid. Since 1992, Mr Mudaliar's substantive post is Internal Auditor. The Disputant's requests, in his letter dated 10 October 2008, were not accepted and the Board maintained its decision regarding the assignment. After his interdiction in October 2009, he was still earning the same basic salary of Rs 67,500.

Mrs Kalapnauth-Rajcoomar moreover obtained Mr Mudaliar's salary slips from the payroll system and produced certified copies of same for the period September 2008 to December 2009 (Documents F, F₁ to F₁₆). As per the salary slips, the Disputant was drawing an Assignment Allowance up to his interdiction. After his interdiction, he was paid his basic salary as Internal Auditor and the Assignment Allowance was stopped. Mr Mudaliar was reinstated in February 2019 as Internal Auditor in a substantive capacity. The Disputant's salary as Internal Auditor was increased after each salary review culminating to Rs 104,700. There was no understanding with the Disputant to be appointed as DMD in a substantive capacity as per the records. The post of DMD is currently vacant and a starting salary of Rs 116,100 is attached to same. All the complaints in the Disputant's Amended Statement of Case are misconceived.

Mrs Kalapnauth-Rajcoomar was thoroughly questioned by Counsel for the Disputant. She notably stated that the letter of appointment dated 8 October 2008 referred to an appendix. The post of DMD still exists at the MHC and only its salary scale has been reviewed. Mr Mudaliar was interdicted from the post of DMD as per the letter dated 28 October 2009 (Document A). The MHC awaited the outcome of the Disputant's criminal case. She agreed that the Disputant would have expected, upon the conclusion of the criminal case, to be reinstated as DMD. The MHC asked a copy of the criminal court judgment and the latter found that the complainant could not be believed. Mr Nobaub and Mr Sookee were acting as DMD. She explained that assignment is decided through the Board, whereas acting is short-term and temporary.

The witness, moreover, answered that responsibility allowance applies to a person not fully qualified and acting allowance for a person assuming the duty and has the qualifications. She did not have information on whether Mr Nobaub or Mr Sookee were qualified. Mr Mudaliar was told that he would be drawing a salary as per the appointment letter and expected to be a *titulaire* of the job. During the Disputant's interdiction, the post of DMD was never declared vacant to be filled. The post has not been declared evanescent. Mr Mudaliar's appointment as DMD was made after due process and a recruitment process following an internal advertisement. He was selected among two other persons and interviewed by a panel. It cannot be said that the Disputant was not qualified. During interdiction, Mr Mudaliar was paid his salary and there were no complaints against him being DMD.

It was further stated that the situation is no longer the same, as in the last nine years' officers have been promoted. The post of DMD is second at the MHC, third is the Heads of Department and fourth is the Internal Auditor. She agreed that Mr Mudaliar stated that he is now sixth. The post of Internal Auditor has not been downgraded as other posts have been upgraded, like that of the Head of Business Unit. The Board maintained the reinstatement of Disputant in his substantive post of Internal Auditor despite his representations.

In re-examination, Mrs Kalapnauth-Rajcoomar notably stated that the Internal Auditor reports to the Audit Committee, which is a sub-committee of the Board, and administratively to the Managing Director. The Disputant is drawing the top salary of Internal Auditor. The qualifications for the post of DMD is '*A good honours degree in a relevant field or a professional qualification and a postgraduate degree from a recognised institution or an alternative*

equivalent qualification acceptable to the Board'. As per records, it was discussed at the Board that in order not to penalise serving officers, they could be assigned duties or appointed although they did not strictly meet required qualifications.

Upon questions from the Tribunal, the witness stated that Mr Mudaliar was offered the post of DMD on an assignment basis because of qualification. There is nothing in writing to say that Mr Mudaliar was not fully qualified.

THE SUBMISSIONS OF COUNSEL

Counsel for the Disputant, in their written submissions, have notably set out the facts of the dispute. The Disputant was DMD and interdicted for nine years. He resumed work after having been cleared of all charges against him. The present incongruous situation is a result of mobility, promotions and appointments at the MHC and subsequent changes in circumstances. It is contended that the Disputant's reinstatement should be in the nature of assumption of duty to the post of DMD. The aforesaid post has not been abolished nor made evanescent nor has anybody been appointed to same in his absence.

The Disputant's appointment to the post of DMD was not based on administrative convenience but made on the basis of an appointment exercise following an internal vacancy. His letter of appointment mentioned both the scheme of duties and the salary scale and not any acting allowance. The Disputant filled the post of DMD substantively. It was specifically stated that he was interdicted from the post of DMD and the Respondent would await the outcome of the trial. The Disputant is entitled to hold the legitimate expectation that he would not be demoted or dismissed from his post against natural justice.

In conclusion, it has been submitted that the letter dated 8 October 2008 includes the word '*salary*', not '*allowance*'. There was no intention to demote the Disputant but rather to reinstate. The salary scale in the letter of appointment cannot be equated to an *ad hoc* assignment of duties or actingship. There is therefore no obstruction for the Disputant to resume duty in his proper status, salary and seniority. The objection of the MHC defeats the end of natural justice.

Counsel for the Respondent has, on the other hand, notably submitted that the evidence clearly shows that the Disputant did not have any right to the post of DMD. The evidence in the matter has revealed that the Disputant held the post of Internal Auditor prior to his interdiction; he was appointed DMD on an assignment basis following an internal interview process; he resumed duty on 6 February 2019; and was reinstated as Internal Auditor. The complaint and the judgment of the Intermediate Court are irrelevant in the determination of the issue in controversy. The Disputant was never appointed as DMD in a substantive capacity but merely on an assignment basis. This assignment had lapsed when he was interdicted and it was in order for the Disputant to be reinstated in his substantive position of Internal Auditor. The Disputant's rank in the hierarchy is misconceived and erroneous.

Counsel for the Respondent also referred to the demeanour of the Disputant under cross-examination in circumventing questions and maintaining answers to his convenience. The Disputant, despite being interdicted, did earn his salary as Internal Auditor and benefitted from relevant salary increases. Reference was also made to qualifications attached to the post of DMD as per the Gobin Report. The Disputant could not state that he held a postgraduate degree. It has been humbly submitted that the matter be set aside as the Disputant has failed to establish his case.

THE MERITS OF THE DISPUTE

A clear reading of the Terms of Reference in the present matter reveals that the Tribunal is tasked with inquiring into whether Mr Mudaliar should have been appointed to the post of DMD following his reinstatement on 6 February 2019.

The hearing of the dispute before the Tribunal has revealed that Mr Mudaliar joined the MHC as Internal Auditor in June 1992. He undertook higher responsibilities at different levels within the company, including that of OIC of the Finance Department and eventually the whole of the MHC itself. In 2008, the post of DMD was created to assist the Managing Director. Following an internal advertisement of the aforesaid post and an interview exercise, the

Disputant was offered the position on an assignment basis. It would be apposite to note the relevant aspects of the letter of offer dated 8 October 2008:

Dear Sir,

*I am pleased to inform you that the Board has decided that you be offered the position of Deputy Managing Director, on an assignment basis. To this effect you will draw salary of **Rs 75,000** plus salary compensations per month, in the scale of **Rs 75,000 x 2,500 – Rs 80,000**.*

This appointment will be effective as from the date of acceptance of this offer and will continue to be subject to the Conditions of Employment applicable in this Company and to such other conditions, rules and regulations as may be approved by the Board from time to time.

As Deputy Managing Director, you will be required to perform the duties as set out in the Appendix of this letter.

Please note that this assignment may be terminated at any time, and in which case you will be immediately reverted to your former position.

Upon the offer of the aforesaid post, the Disputant, by way of letter dated 10 October 2008, accepted same and invited the Board to consider other matters regarding his salary; whether a company car should be attached to him; and to consider formally appointing him in the next three months. There is no reply on record from the Respondent in relation to this letter. However, in October 2008, a provisional charge was lodged against the Disputant by the ICAC and he was interdicted from duty. The relevant aspect of a letter dated 28 October 2009 (Document A) from the Managing Director may be noted as follows:

Re. Interdiction

Please find enclosed copy of a letter (Ref.ICAC/FIR/26/06) dated 27 October 2009 from the Independent Commission Against Corruption (ICAC) informing me of a provisional charge retained against you and your subsequent release on bail.

In view of the above and following consultations with the Company's Legal Adviser, I have no other alternative than to interdict you from the exercise of your functions of Deputy Managing Director. You are hereby interdicted with immediate effect, pending completion of the case, and following which a decision will be taken on your reinstatement or otherwise.

It must, at this stage, be noted that although the Disputant was interdicted from his functions of DMD, there has been no evidence adduced to show that his assignment to the post of DMD was formally terminated upon his interdiction. The letter of offer dated 8 October 2008 clearly stipulates that the assignment to the post of DMD may be terminated at any time. Why this has not been done by the Respondent upon interdicting Mr Mudaliar has not been explained and appears to be a serious lapse on the part of the MHC. The Tribunal has, however, noted that this particular issue has not been raised by the Disputant during the hearing of the present matter.

It has not been disputed that the Disputant was formally charged and underwent trial before the Intermediate Court on two corruption charges. As per a judgment of the aforesaid Court, bearing reference 2018 INT 266, the two counts brought against him were dismissed on 3 October 2018. The Disputant, on the same day of the judgment, wrote to the Respondent's OIC informing that his case has been dismissed and requested that he be reinstated.

Thereafter, the Respondent's OIC replied, on 19 November 2018, in relation to Mr Mudaliar's reinstatement. The following may be noted from the aforesaid reply:

With reference to your letter dated 3rd October 2018, this is to inform you that Board at its meeting of 13th November 2018 has approved that you be reinstated in your substantive post of Internal Auditor with effect from the date of your interdiction, i.e., 28th October 2009, subject to clearance from the relevant authority.

The Disputant resumed office on 6 February 2019 and occupies the post of Internal Auditor. He however expressed his fears, in a letter dated 8 February 2019, that he has been demoted as per his hierarchical status in the company. The Disputant has not been assigned the post of DMD, as was the case prior to his interdiction, and considers being reverted to the post of Internal Auditor to be a demotion. He also contends that he is lower in rank in the organisation being sixth in the hierarchy. He therefore wishes to know whether he should have been appointed to the post of DMD following his reinstatement on 6 February 2019.

During the course of the hearing on the present matter, there was much contention as to whether the Disputant was appointed to the post of DMD or was he merely assigned the

duties of the aforesaid post. The Disputant contends that he was appointed to the post substantively as he would be drawing the salary of same as per the letter of offer dated 8 October 2008 and it was not stated that he would be paid an acting allowance or otherwise. On the other hand, the Respondent has firmly maintained that Mr Mudaliar was only assigned the duties of DMD and not substantively appointed to same.

Having perused the letter dated 8 October 2008 (as reproduced above), it can clearly be gathered that the Disputant was offered appointment to the position of DMD on an assignment basis. Moreover, the letter clearly states that '*... this assignment may be terminated at any time, and in which case you will be immediately reverted to your former position*'.

It has also been stated in the letter that he would be subject to the Respondent's conditions of employment. In this regard, the Respondent's witness has produced the relevant conditions of employment regarding types of appointment at the MHC. The following extract of the Gobin Report of 2008 (Document E) should be noted:

Types of Appointment	4.3	<p><i>Appointment may be made:</i></p> <ul style="list-style-type: none"> <i>(i) on probation with a view to confirmation in a permanent capacity;</i> <i>(ii) in a permanent capacity;</i> <i>(iii) on a temporary basis;</i> <i>(iv) on a performance contract basis;</i> <i>(v) on a project / assignment basis; and</i> <i>(vi) on contract.</i>
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It can be clearly gathered that the offer to the post of DMD as per the letter dated 8 October 2008, being on an assignment basis, falls under sub-paragraph (v) of the types of appointment listed above, which prevailed at the MHC since 1 July 2008.

The Respondent further produced the Disputant's salary slips for the period September 2008 to December 2009. A perusal of these slips shows that in the months of October 2008 to June 2009, Mr Mudaliar was paid an Assignment Allowance of Rs 10,000 in addition to a basic salary of Rs 65,000. From July 2009 to October 2009, he was paid an Assignment Allowance of Rs 7,500 as well as his basic salary of Rs 67,500. The salary slip of November 2009 *inter alia* shows that he was drawing a basic salary of Rs 67,500 but he did not receive any Assignment

Allowance. It should be noted that the November 2009 salary slip coincides with his interdiction on 28 October 2009.

As is apparent from the relevant payslips produced, Mr Mudaliar was paid an Assignment Allowance for the period he was performing the duties of DMD and he was not earning the basic salary of DMD, which started as from Rs 75,000 as per the letter dated 8 October 2008. Moreover, it cannot be said that the Disputant, who currently draws Rs 104,700 as Internal Auditor, is now earning less than prior to his interdiction.

It has not been disputed that there was a selection exercise at the MHC for the post of DMD, whereby the Disputant was interviewed by a panel of the Corporate Governance and HR Committee along with two other candidates following an internal advertisement for the post. Despite this, the Tribunal cannot reasonably come to the conclusion that Mr Mudaliar was substantively appointed as DMD in view of the fact that the letter of offer dated 8 October 2008 clearly stated that he was offered the aforesaid position on an assignment basis; that the assignment may be terminated at any time; and that, as per the salary slips produced, the Disputant was drawing an Assignment Allowance in addition to his basic salary and not the basic salary of DMD.

The Tribunal has also noted that if the appointment to DMD had been made on probation, as has also been asserted by the Disputant, the letter of offer should have clearly stated so. However, there is no mention of the word '*probation*' in the aforesaid letter. Moreover, the Tribunal has also noted that Mr Mudaliar, in his letter of acceptance dated 10 October 2008, made an appeal to the Board of the MHC notably stating '*considering to formally appointing me within the next 3 months*'. This particular request strongly lends to the interpretation that Mr Mudaliar was not substantively appointed to the post of DMD as per his own letter of acceptance and that he wished to be confirmed as same. The Tribunal cannot therefore accept the Disputant's assertion that his appointment to the post of DMD in October 2008 was a substantive appointment.

The issue of the Disputant's qualifications has also been raised during the hearing of the present matter. As per the position description of DMD (Document D), the academic requirements of the post are '*A good honours degree in a relevant field or a professional qualification and a postgraduate degree from a recognised institution or an alternative*

equivalent qualification acceptable to the Board.'. The Disputant has firmly stated that he holds an ACCA qualification, which, according to him, is equivalent to a postgraduate degree.

The Tribunal, in this regard, has noted that the Disputant was never informed in writing that he was not fully qualified for the post of DMD as is being contended by the Respondent. There is no mention of this in the letter of offer dated 8 October 2008. In fact, The Tribunal finds that it is unfair for the Respondent to have raised this issue, in its Amended Statement of Case, when the Disputant should have, at the very least, been made aware his lack of qualifications when he was assigned the responsibilities of DMD.

The Tribunal cannot substitute itself for the Respondent in assessing the qualifications or lack thereof of the Disputant. Although the dispute is not specific as to required qualifications for the post of DMD, the issue may be relevant as to the question of appointment. The Tribunal would, however, dare not venture to pronounce itself on this issue without having the benefit of complete evidence as regards the qualifications of the Disputant.

It has, moreover, been noted that the Disputant has derided his present situation since his reinstatement at the MHC. He has notably complained that juniors are now his senior and that his post of Internal Auditor is now sixth in the hierarchy. The Disputant has contended that he holds the legitimate expectation that he would not be dismissed or demoted from his post. In this regard, the Tribunal notes that the Terms of Reference of the dispute is not asking it to enquire into whether the Disputant has been demoted or dismissed in the post of Internal Auditor to which he was reinstated nor to access the position of the post in the MHC's hierarchy.

It is well settled that the Tribunal cannot inquire into a matter that is not within the ambit of the Terms of Reference of the dispute. It would be pertinent to note the following from the Supreme Court in *Air Mauritius v Employment Relations Tribunal* [2016 SCJ 103]:

Under section 70 (1) the Tribunal is required to enquire into the substance of the dispute that is referred to it and to make an award thereon and it is not empowered to enquire into any new matter that is not within the terms of reference of the dispute.

The Disputant, in the present matter, has sought to define his appointment to the post of DMD as a substantive one. Having considered the evidence before it and the arguments put forward, the Tribunal has not found this to be so. Can the Tribunal therefore find that the Disputant should be appointed to the post of DMD following his reinstatement on 6 February 2019?

The arguments of the Disputant have revealed that he is seeking a substantive appointment to the post DMD having asserted that he was appointed to same substantively. This is, moreover, corroborated by his prayer at paragraph 38 (a) of his Amended Statement of Case, which reads '*to reinstate and confirm the Disputant back to his post of Deputy Managing Director;*'. This clearly implies that the Disputant wishes to be appointed and confirmed to the aforesaid post.

Furthermore, a proper reading of the Terms of Reference of the dispute does not indicate in what capacity the Disputant wishes to be appointed to the post of DMD, i.e. substantively or on an assignment basis. In the absence of any precise indication on this matter from the wordings of the Terms of Reference, the Tribunal can only be guided by the evidence adduced and arguments put forward to this effect.

Although it has not been disputed that the post of DMD is presently vacant and has not been made evanescent, the Tribunal has also noted that it would be unfair to decide on the substantive appointment of the Disputant as DMD in view of other candidates who may be eligible to the aforesaid post. As per the position description (Document D), the post of DMD is not one to which a person can be automatically promoted to. It is open to officers in the grade of Head of Business Unit with a minimum of 10 years' experience at senior management level having the set qualifications. Thus, to decide that the Disputant should be appointed substantively as DMD would be arbitrary with regard to other potential officers eligible for the post.

In view of the above and having notably found that Mr Mudaliar was appointed to the post of DMD on an assignment basis as per the letter of offer dated 8 October 2008 despite his arguments to the contrary and that the assignment was in accordance with the prevailing conditions of employment as per the Gobin Report of 2008, the Tribunal cannot therefore

award that he be substantively appointed to the post of DMD following his reinstatement in February 2019.

The dispute is therefore set aside.

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SD Shameer Janhangeer
(Vice-President)

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SD Raffick Hossenbaccus
(Member)

.....
SD Rabin Gungoo
(Member)

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SD Ghianeswar Gokhool
(Member)

Date: 11th December 2020