

**EMPLOYMENT RELATIONS TRIBUNAL**

**AWARD**

**ERT/ RN 23/21**

**Before**

<b>Indiren Sivaramen</b>	<b>Acting President</b>
<b>Raffick Hossenbaccus</b>	<b>Member</b>
<b>Rabin Gungoo</b>	<b>Member</b>
<b>Arassen Kallee</b>	<b>Member</b>

**In the matter of:-**

**Mr Gunshyamsingh Pokhun (Disputant)**

**And**

**Mauritius Cane Industry Authority (Respondent)**

The above case has been referred to the Tribunal by the Commission for Conciliation and Mediation under Section 69(9)(b) of the Employment Relations Act, as amended (hereinafter referred to as “the Act”). Both parties were assisted by Counsel. The terms of reference of the point in dispute read as follows:

*“In accordance with the provisions spelt out in the 2016 Pay Research Bureau (PRB) Report, I should be granted one incremental credit for each complete year of actingship/assignment of duties as IT Technician from Dec 2004 to Dec 2016. It is noted that the payment of incremental credit made in September 2018 was in relation to the period 2014 to 2016 only. I have inquired about the rationale that have been used which lead to the non-payment of incremental credit for the remaining time frame, that is 2004-2013. In the opinion of the HRM, there is a break in actingship as IT Technician for 3 weeks during 29.07.2013 to 23.08.2013.”*

Counsel for Respondent informed the Tribunal that the Respondent was not insisting on the points of law raised as preliminary objections in the Statement of Defence of the Respondent. Disputant was assigned the duties of IT Technician in an acting capacity with effect from 22 November 2004 (Annex 1 to the Statement of Case of Disputant) at the ex-Sugar Planters Mechanical Pool Corporation (ex-SPMPC). Following the setting

up of the Respondent in 2012, the Disputant was transferred to the permanent and pensionable establishment of the Respondent in the same year and the assignment of duties continued. The facts of the case are not in dispute, and the only issue is in relation to whether there was continuity of such assignment of duties/actingship during the period from 29 July 2013 to 28 August 2013. The Disputant had in fact sent a letter dated 17 July 2013 to the Chief Executive Officer (CEO) of the Respondent to the effect that he was withdrawing himself from the duties of IT Technician and this request was accepted in a letter dated 26 July 2013 emanating from the Respondent (as per Annexes 4 and 5 to the Statement of Case of the Disputant). In the said reply, Disputant was informed that he would be posted to the Sugar Storage & Handling Unit (SSHU) of the Respondent at Caudan as Assistant Stores Officer where he would henceforth have to report for duty starting Monday 29 July 2013.

It is not challenged that from 22 November 2004 up to 28 July 2013, Disputant was acting IT Technician. The Disputant deposed before the Tribunal and he described the circumstances which led him to send the letter at Annex 4 to his Statement of Case. He stated that despite his posting to the SSHU, he had to report there in the morning and then had to come and help Mr Deena, the Finance Manager, in his work. He was thus also reporting to Mr Deena. Disputant suggested that both before and after the letter of 26 July 2013 from the MCIA (Annex 5 to the Statement of Case of Disputant) he was the one responsible for the IT issues at the Respondent in relation to the IT system which included payroll, finance, stock control and the planters' system. He alleged that his employer was always aware that he was responsible to operate the said IT system. He stated that he was called every day to come and give support to staff and do anything attached to the system and even had to stay all night on one occasion to get the system up and running. This was, according to him, during the period which is in dispute in the present matter.

Mr Deena, Finance Manager of the Respondent, was called as a witness for the Disputant. He deposed and he accepted the contents of Annex 6 to the Statement of Case of Disputant which was a report drawn at the request of the then CEO of the Respondent. He stated that the then IT Consultant could not assist with the planters' system whilst Disputant was "at ease" with the said system. He stated that Disputant did help and he accepted that the latter was present whenever required.

Mr Santbaksingh, Human Resource Manager of the Respondent, then deposed and he stated that he had no reasons not to believe what the Disputant or witness Mr Deena had stated. He accepted that Disputant may have intervened in relation to IT issues during the said period but he stated that the HR department was not aware. He suggested that Disputant was helping. He stated that Disputant was working and reporting to the SSHU as Assistant Stores Officer during the period under review. Disputant was coming from the SSHU when his services were required. He became aware only later that the latter had even worked overnight to deal with IT issues. He however stated that the letter emanating from Disputant to withdraw himself from the duties of IT Technician together with the letter of acceptance of such request from Respondent constituted a break in the actingship of Disputant as IT Technician. He

stated that he was in fact surprised when he learned that the CEO was reinstating the Disputant in his actingship as from 29 August 2013.

The Tribunal has examined all the evidence on record including documents annexed to the Statement of Case of Disputant and the submissions of both Counsel. Though the crux of the matter relates to the relevant provision of the Pay Research Bureau report as is clear from the terms of reference of the dispute, the Tribunal was not provided with a copy of same though the Tribunal did hint to the relevance of such a document. Paragraph 11(h) of the Statement of Case of the Respondent however does refer to Recommendation 65 of the Errors, Omissions and Anomalies Committee (EOAC) Report – PRB 2013 as being the provision which would allegedly apply in this case. As per paragraph 11(h) of the Statement of Case of the Respondent and as per the EOAC Report 2013, which the Tribunal can take note is a public document, Recommendation EOAC 65 reads as follows:

*“To insert after paragraph 18.9.11 the following:*

***Incremental Credit for Actingship/Assignment of Duties  
Recommendation EOAC 65***

***18.9.11 The Committee recommends that, where an officer has been appointed to act/assigned duties in a higher office and is subsequently appointed to the same office after a selection exercise and his appointment takes effect as from the date of assumption of duty, the officer should be granted one incremental credit for each completed year of actingship/ assignment of duties provided that:***

- (a) such actingship/assignment of duties is continuous;***
- (b) the adjusted salary is not higher than what the officer would have drawn had he been appointed in a substantive capacity on the date he was appointed to act/ assigned higher duties; and***
- (c) such incremental credit is payable as from the date the officer is appointed substantively in the post.***

***18.9.12 The Committee further recommends that the salary of officers falling in a similar situation prior to the date of implementation of this Report, should be adjusted hypothetically.***

However, since the Disputant was appointed IT Technician at the Respondent only with effect from 3 January 2017, the Tribunal is more inclined to find that it would be the PRB Report 2016 (then more in line with the terms of reference which are before us) which would be relevant in the present case. The Tribunal is here assuming that the Disputant opted to be governed by the said PRB report. The PRB Report 2016 in any event contains fairly similar provisions in relation to incremental credits for actingship/assignment of duties as the EOAC Report 2013, except that the EOAC Report 2013 also catered at paragraph 18.9.12 for the salary of officers falling in a similar situation but prior to the date of implementation of the EOAC Report 2013.

The Tribunal takes note that the relevant provisions in the PRB Report 2016 read as follows:

***Incremental Credit for Actingship/Assignment of Duties***

18.9.8 *Officers appointed to act/assigned duties in a higher office and subsequently appointed to the same office after a selection exercise and in cases when appointment takes effect as from the date of assumption of duty, are granted one incremental credit for each completed year of actingship/assignment of duties provided that:*

*(a) such actingship/assignment of duties is continuous;*

*(b) the adjusted salary is not higher than what the officer would have drawn had he been appointed in a substantive capacity on the date he was appointed to act/assigned higher duties; and*

*(c) such incremental credit is payable as from the date the officer is appointed substantively in the post.*

***Recommendation 3***

18.9.9 ***We recommend that one incremental credit for each completed year of actingship of assignment of duties be continued to be paid to officers appointed to act/assigned duties in a higher office and subsequently appointed to the same office after a selection exercise provided that criteria at 18.9.8 (a) to (c) above are satisfied.***

The Tribunal is here only concerned with the first condition mentioned at paragraph 18.9.8 (a) above (similar to paragraph 18.9.11(a) of the EOAC Report 2013), that is, that “*such actingship/assignment of duties is continuous*”. This award is thus to be read strictly subject to the above. Irrespective of the general acknowledgment that Disputant had intervened/assisted with the IT system and done the things he averred during the alleged ‘break of actingship’, the Disputant in the present case had the burden to show that his actingship/assignment of duties was continuous. There is firstly the letter dated 17 July 2013 which Disputant sent to the CEO of the Respondent to the effect that he was withdrawing himself from the duties of IT Technician and which request was accepted in writing by the Respondent (as per Annexes 4 and 5 to the Statement of Case of the Disputant). As a result, Disputant was posted to another department, that is, the SSHU. There is also evidence that a written request was later made by the Disputant (dated 23 August 2013) for the CEO to consider re-instating him in the IT unit, whilst the Disputant mentioned in his request, the letter dated 26 July 2013 (Annex 5 to the Statement of Case of the Disputant) from the CEO of the Respondent. The evidence adduced by the Human Resource Manager is to the effect that Disputant was indeed assigned the duties of IT Technician anew but only as from 29 August 2013. His evidence that there was no complaint whatsoever from Disputant for non-payment of any allowance for the period from 29 July 2013 to 28 August 2013 has remained unchallenged. The Tribunal has no reason not to believe him. Disputant even stated in cross-examination when questioned on this issue that “*If I was paid any actingship then there would not have been a duty break...*”

Though the Disputant may have assisted with the IT system during that period, this does not necessarily mean that he was thus being assigned the duties of or was appointed to act (underlining is ours) in the office of IT Technician during the period concerned. For there to be an actingship/assignment of duties, there must necessarily be an appointment to act in a higher post or an assignment of duties given to an officer by the Responsible Officer/Supervising Officer or the appropriate Service Commission (in a relevant case). Performing some of the duties of a higher post is not enough. Actingship or assignment of duties is formal in nature for the simple reason that duties are undisputedly intertwined with the responsibilities which go with it. The Tribunal has examined carefully all the evidence on record and though Disputant made interventions and/or assisted with the IT system during the period under review (from 29 July 2013 to 28 August 2013), there is no conclusive evidence before us, specially bearing in mind Annexes 4 and 5 to the Statement of Case of Disputant, that Disputant was formally requested to assume full responsibilities (underlining is ours) for the position of IT Technician during the same period. Even the own letter of Disputant dated 23 August 2013 (Annex 7 to Statement of Case of Disputant) is quite telling in that respect. Indeed, Disputant wrote the following in the said letter: "*I would appreciate if you could consider [underlining is ours] re-instating me in the IT unit.*" This does not sit comfortably with the suggestion that the Disputant was all along or continued to perform the duties of IT Technician in an acting capacity.

Also, it is apposite to note that Annex 6 to the Statement of Case of Disputant which as per the evidence adduced by the Disputant emanates from Mr Deena, the witness called on behalf of Disputant, contains the following:

*"Management then realized that MCIA could not afford to rely solely on the knowhow and whims of Mr Pokhun and decided to go ahead with the development of a new payroll software, accounting software and planter system."* Disputant in his letter of 17 July 2013 (Annex 4 to the Statement of Case of Disputant) when informing of his decision to withdraw from the duties of IT Technician wrote lengthily on his capabilities and competence to lead any IT project of the MCIA and on the advisability of continuing to use the systems that the ex-SPMPC was using provided that he continued to provide adequate maintenance of the systems. He at no time referred in his letter to the IT Consultant, Advanced Software Labs Ltd, even though he must by then have been aware of the two letters already sent to him (Annexes 2 and 3 to his Statement of Case).

There is insufficient evidence on record to conclude that Disputant was during the period under review formally requested to assume full responsibilities for the position of IT Technician. His assistance was sought given the circumstances but the capacity in which he was assisting the Respondent is not clear given the correspondences exchanged between the parties and that Disputant accepted that he was reporting for duty at SSHU and did not deny that he was not paid any allowance for the said period. When questioned in chief by his own counsel as to what he has to say if management avers that he was only helping out, Disputant denied that this was the case and stated that (then) "*I could have refused totally. I could have said no.*" Disputant has not

adduced sufficient evidence to show that in fact he could not have refused to assist since the interventions he performed during that period were duties/responsibilities which had been duly assigned to him. Also, there is no satisfactory evidence on record that the interventions of the Disputant were to such an extent that he could not perform his duties at the SSHU where, according to the Human Resource Manager, he was working and reporting for duty during the period under review as Assistant Stores Officer.

In the light of all the evidence on record, the Tribunal is not satisfied even on a balance of probabilities that the Disputant was assigned duties or appointed to act in the office of IT Technician from 29 July 2013 to 28 August 2013. At this stage, it is apposite to note that the terms of reference wrongly referred to "23.08.2013", which we believe is a mere typo, instead of "28.08.2013". At least one of the conditions (continuity of actingship/assignment of duties) for the granting of the additional incremental credits claimed for the period from 2004 to 2013 was missing and the Disputant has failed to show even on a balance of probabilities that he should have been granted such additional incremental credits.

In any event, the Tribunal finds that the matter should have been addressed then and there in 2013. This award is based strictly on the particular facts of the case before us. It does not, in any manner, affect our view that opportunity for an acting assignment should be granted whenever required since this ultimately leads to a win-win situation where both the officer and the organisation benefit.

For all the reasons given above, the dispute is otherwise set aside.

**SD Indiren Sivaramen**

**Acting President**

**SD Raffick Hossenbaccus**

**Member**

**SD Rabin Gungoo**

**Member**

**SD Arassen Kallee**

**Member**

**28 September 2021**